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FOREWORD: THE AMERICANS WITH DISABILITIES ACT AT 15—PAST, PRESENT, & FUTURE

Michael E. Waterstone[*]

For many, it may be hard to remember what life was like before the Americans with Disabilities Act (ADA).[1] In many states, private employers could discriminate against people with disabilities publicly and with impunity. Places were often accessible to everyone in the general public except people with disabilities. Services that state and local governments provided, like voting, public transportation, and street maintenance, could be offered in ways that precluded the participation of people with disabilities. In most cases, the only restrictions to these behaviors were the non-disabled being "guided by the better angels" of their nature.[2]

The ADA changed all this. It is, of course, not the only federal civil rights statute addressing discrimination on the basis of disability.[3] But the ADA is our country's most promi-

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[*] Assistant Professor of Law, University of Mississippi School of Law. First and foremost, I would like to thank Dean Sam Davis, without whose support and guidance this symposium could not have happened. Every young professor deserves such an encouraging Dean. I would also like to thank the participants in the symposium: Professors Peter Blanck, Michael Stein, Ann Hubbard, Kaaryn Gustafson, Camille Nelson, and Miranda McGowan. They all enriched our law school community with their presence. Last but not least, the entire staff of the University of Mississippi Law Journal worked hard to make this symposium happen. Two members deserve special thanks for their dedication: Elizabeth Mills, the Symposium Coordinator, and Gregg Mayer, the Executive Editor. I thank them for their efforts.

[1] 42 U.S.C. § 12101 et. seq. (2000).

[2] Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356, 375 (2001) (Kennedy, J., concurring).

[3] The Rehabilitation Act, 29 U.S.C. § 794 (2000), the ADA's predecessor, prohibited discrimination against people with disabilities in programs or activities

nent legal and policy statement on the rights of people with disabilities, and was intended to transform a dialogue dominated by medical needs, charity, and welfare into the language of civil rights. Yet while the ADA has undeniably addressed more obvious forms of discrimination in employment, state and local government programs and services, and public accommodations, has it been successful in its larger goals of assuring "equality of opportunity, full participation, independent living, and economic self-sufficiency" for people with disabilities?[4] And, at its fifteenth birthday, is it on the road to doing so?

There are no easy answers to these questions. They require thought about judicial interpretations of the statute, federalism, welfare vs. antidiscrimination approaches, the continuing and invidious effects of subordination and stigma, the evolving nature of civil rights movements, private and public enforcement, and different notions of equality. These discussions have all been playing out to various extents in a rich and evolving body of disability legal scholarship. But there is ample room for new thinking and fresh approaches, and it was in that spirit that this symposium, "The Americans with Disabilities Act at 15: Past, Present, and Future" was convened at the University of Mississippi School of Law in November of 2005.

The articles that resulted from this gathering encompassed a diverse range of perspectives, but all make an important contribution to the overall dialogue about where disability law has been and should be going. As part of their larger research agenda focusing on employee and employer factors

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receiving federal financial assistance. The Fair Housing Amendments Act, 42 U.S.C. § 3604(f) (2000) prohibits discrimination on the basis of disability in the sale or rental of housing. The Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et. seq. (2000), prohibits discrimination in education for students ages 3-21. Of more recent vintage are several provisions in the Help America Vote Act, 42 U.S.C. § 15481.

[4] 42 U.S.C. § 12101(A)(8).

associated with employer's decisions to accommodate current employees, Peter Blanck and his co-authors demonstrate in "Workplace Accommodations: Empirical Study of Current Employees" that employer accommodation decisions are based on factors consistent with the ADA model, and that overall, accommodation costs are low and benefits relatively high. This is an important rejoinder to a consistent critique that forcing employers to pay for reasonable accommodations for workers with disabilities undermines the goal of increasing their participation in the labor market. By taking an empirical approach to this problem, this article also has an important place in the growing body of empirical disability law scholarship. Professor Michael Stein and his co-authors treat the convergence of the fifteenth anniversary of the ADA and the twilight of the Rehnquist Court as an opportunity to demonstrate how that Court took the lead in treating disability discrimination as being fundamentally different than sex discrimination. Focusing on the Court's divergent approaches to sex and disability-based paternalistic employment policies, "Disability and Employment Discrimination at the Rehnquist Court" suggests that the Rehnquist Court harmed the disability antidiscrimination project. Professor Ann Hubbard, in "A Military-Civilian Coalition for Disability Rights," offers an intrepid and thoughtful look at an important political reality; that is, the increasing number of veterans with disabilities returning from the war in Iraq. She posits that by developing an appreciation for each other's past contributions and present strengths, traditional disability rights advocates and veterans both stand much to gain. In "Disability, Fluidity, and Measuring without Baselines," Professor Kaaryn Gustafson addresses an important yet often overlooked issue in disability scholarship; namely, the lack of baseline social science measurements of the welfare of individuals with disabilities, of attitudes about rights, and of perceptions of individual identity. By advocating for increased attention in the social sciences to these measures, as well as for critical legal theorists to incorporate disability into their analyses of law and social subordination, Professor Gustafson offers a model to reinvigorate the

disability rights movement. Professor Camille Nelson gives a frank critique of the ADA's limitations in providing protections for people with episodic mental illnesses in "Starting Anew: The ADA's Disability with respect to Episodic Mental Illness." Addressing the issue from a critical perspective, Professor Nelson demonstrates the importance of not discussing these issues in a racial vacuum. Ultimately, she provides a positive vision of how to breathe new life into the ADA on this important topic.

Finally, two students contributed to this symposium. In "How Bizarre? How the Application of Reasonable Accommodation to Employees 'Regarded As' Disabled under the ADA Does Not Necessarily Lead to Bizarre Results," Elizabeth Mills addresses the current circuit split of whether employer's have to provide reasonable accommodations to employees who meet the ADA's definition of being "regarded as" disabled. And Elizabeth Penn offers a student's perspective on the casebook *Disability Civil Rights Law & Policy*. Her book review should prove useful to students, teachers, and practitioners who use the book.

Time will tell whether the ADA, at its fifteenth anniversary, will be viewed as the high-water mark of civil rights protection for people with disabilities, or merely the forerunner of other legal and policy measures. The participants in this symposium found much to celebrate in the ADA's approach and implementation, but also noted areas where disability law needs to continue to grow and evolve to meet the new challenges of the next fifteen years and beyond.

WORKPLACE ACCOMMODATIONS: EMPIRICAL STUDY OF CURRENT EMPLOYEES*

*Helen A. Schartz,*** *Kevin M. Schartz,**** *D. J. Hendricks***** & *Peter Blanck******

I. INTRODUCTION

Integral to employment for people with disabilities is the Americans with Disabilities Act's (ADA)[1] workplace accommo-

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* For additional information on disability law and policy issues, see The Burton Blatt Institute, http://bbi.syr.edu (last visited Apr. 3, 2006). This research was in part funded by grants: (a) to the last author from the U.S. Department of Education, National Institute on Disability and Rehabilitation Research, for the Rehabilitation Research and Training Center (RRTC) on Workforce Invesment and Employment Policy for Persons with Disabilities, Grant No. H133B980042-99, "It Works," Grant No. H133A011803; "Demand Side Employment Placement Models," Grant No. H133A060033, "Technology for Independence: A Community-Based Resource Center," Grant No. H133A021801; and the Rehabilitation Services Administration (RSA) for RRTC on Employment Policy for People with Disabilities, and (b) to the third author from the U.S. Department of Labor, Office of Disability and Employment Policy, Contract #J-9-M-2-0022. The opinions expressed herein do not necessarily reflect the position or policy of the U.S. Department of Education, the U.S. Department of Labor, or any other entity. Nor does mention of tradenames, commercial products, or organizations imply endorsement by the U.S. Departments of Education or Labor. The authors would like to thank James Schmeling and LeeAnn McCoy for their helpful comments and insights and Todd Schmidt for editing assistance.

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[1] Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 et seq. (2000).

dation provision that allows qualified individuals to perform essential job functions.[2] Title I of the ADA prohibits employers from discriminating against qualified individuals with disabilities in hiring, retention, promotion or termination. One form of prohibited discrimination is failing to make reasonable accommodations for a qualified job applicant or employee's physical or mental limitations, unless the accommodations would impose an undue hardship on the business.[3] Through the ADA's "interactive process," employers and employees collaborate to identify and implement workplace accommodations that are within reason.

Little empirical evidence is available to understand employers' decisions to provide accommodations. This article continues our line of empirical study and explores employee and employer factors associated with employers' decisions to accommodate current employees. Building on our previous research,[4] the present analyses are based on data from interviews with employers who contacted the Job Accommodation Network (JAN) concerning workplace accommodations for current employees.

In the following sections, we first describe workplace accommodation requirements and analysis, before and after ADA passage in 1990. Next, we examine the extent to which employers' accommodation decisions are linked closely to the ADA's definition of disability for a qualified employee or other factors. Lastly, we discuss the implications of the present findings for our ongoing line of study.

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[2] *Id.* § 12112(b)(5)(A). *See generally* PETER BLANCK ET AL., DISABILITY, CIVIL RIGHTS LAW, AND POLICY: CASES AND MATERIALS (Louis Higgin ed., 2005).

[3] ADA § 12112(b)(5)(A).

[4] *See* Helen A. Schartz et al., *Workplace Accommodations: Evidence Based Outcomes, Work* (forthcoming); *see also* D.J. Hendricks et al., *Cost and Effectiveness of Accommodations in the Workplace: Preliminary Results of a Nationwide Study*, 25 DISABILITY STUD. Q., (Number 4) (Fall 2005), *available at* http://www.dsq-sds.org (last visited Apr. 3, 2006).

II. WORKPLACE ACCOMMODATIONS PRIOR TO AND AFTER ADA PASSAGE

The employment provisions of the ADA largely are derived from prior vocational rehabilitation laws.[5] Vocational rehabilitation laws, originally enacted to provide rehabilitation and employment services for servicemen returning from WWI,[6] were broadened to include citizens with disabilities in 1920.[7] Nondiscrimination provisions in employment were introduced by Title V of the subsequent Rehabilitation Act of 1973.[8] Section 504 defined disability discrimination, providing that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be sub-

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[5] *See generally* BLANCK, *supra* note 2, at 22 (discussing the origins and history of the ADA's workplace accommodation provisions).

[6] *See* Smith-Sears (Vocational Rehabilitation) Act of 1918, 65 Pub. L. No. 178, ch. 107, 40 Stat. 617 (providing for the "vocational rehabilitation and return to civil employment of disabled persons discharged from the military or naval forces"); *see also* Peter Blanck, *Civil War Pensions and Disability*, 62 OHIO ST. L.J. 109 (2001) (discussing history of veterans pension and vocational rehabilitation laws).

[7] Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq. (2000) (originally enacted as Fess-Kenyon (Vocational Rehabilitation) Act of 1920, Pub. L. No. 66-236, 41 Stat. 735 (codified as amended at 29 U.S.C. § 31-45 (1928) (repealed 1973)) (providing "for the promotion of persons disabled in industry or in any legitimate occupation and their return to civil employment . . . " including people "who, by reason of a physical defect or infirmity, whether congenital or acquired by accident, injury, or disease [are], or may be expected to be, totally or partially incapacitated for remunerative occupation.").

[8] Revisions established the Rehabilitation Services Administration and programs for rehabilitation training, research, and evaluation activities. *See* Rehabilitation Act of 1973, Pub. L. No. 93-112, §§ 100-130, 87 Stat. 355, 363-74 (Title I, "Vocational Rehabilitation Services"); Rehabilitation Act of 1973, Pub. L. No. 93-112, §§ 200-204, 87 Stat. 355, 374-77 (Title II, "Research and Training"); Rehabilitation Act of 1973, Pub. L. No. 93-112, §§ 300-306, 87 Stat. 355, 377-85 (Title III, "Special Federal Responsibilities"); Rehabilitation Act of 1973, Pub. L. No. 93-112, §§ 400-407, 87 Stat. 355, 385-90 (Title IV, "Administration and Program and Project Evaluation"); *see also* 29 U.S.C. § 791(b) (2000) (requiring departments and agencies of the executive branch to submit affirmative action plans "for the hiring, placement, and advancement of individuals with disabilities. . . . Such plans shall include a description of the extent to which and methods whereby the special needs of employees who are individuals with disabilities are being met."), *and* 29 U.S.C. § 793 (2000) (requiring similar plans for government contractors).

jected to discrimination under any program or activity receiving Federal financial assistance. . . ."[9]

Although Section 504 established a seemingly broad definition of disability discrimination, legal recourse for individuals with disabilities was limited in practice. To qualify for the antidiscrimination protection, the individual's disability must have been related to employment.[10] Furthermore, the Act applied only to federal executive branch agencies (Section 501),[11] federal government contractors and subcontractors (Section 503),[12] and activities that received Federal financial assistance and those conducted by an Executive branch or the U.S. Postal Service.

The Section 504 requirement that the disability to be related to employment would be removed by subsequent amendments and implementing regulations.[13] However, the ADA's subsequent three major categories of disability (i.e., actual disability, regarded as having a disability, and record of a disability)[14] may be traced to the 1974 amendments of Section 504.[15] Subsequent interpreting regulations for Section 504, developed by the Department of Health, Education and Welfare, included the concepts of "reasonable accommodation," "qualified . . . employee" and "undue hardship."[16]

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[9] Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794 (2000).

[10] *See* Rehabilitation Act of 1973, § 7(6), Pub. L. 93-112, 87 Stat. 355 (codified as amended 29 U.S.C. § 705(20)(A) (2000)) (defining "handicapped individual" as having a disability which constitutes or results in "substantial handicap to employment" and "can reasonably be expected to benefit in terms of employability from vocational rehabilitation services").

[11] Rehabilitation Act of 1973 (Section 501), 29 U.S.C. § 791 (2000).

[12] Rehabilitation Act of 1973 (Section 503), 29 U.S.C. § 793 (2000).

[13] *See* Rehabilitation Act Amendments of 1974, § 111(a), Pub. L. No. 93-651, 89 Stat. 2-3 (codified as 29 U.S.C. § 705(20)(B)(i)-(iii) (2005)), *and* 34 C.F.R. § 104.3(j) (2000).

[14] ADA, 42 U.S.C. § 12102(2) (2000) (defining "disability").

[15] *See* Rehabilitation Act Amendments of 1974, § 111(a), Pub. L. No. 93-651, 89 Stat. 2 (codified as amended in 20 U.S.C. § 705(20)(B)(i)-(iii) (2000)) (defining a handicapped individual as one "who (A) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (B) has a record of such an impairment, or (C) is regarded as having such an impairment."); *see also* BLANCK, *supra* note 2, at 28 (arguing that "Congress may not have expected Section 504 to have a major impact").

[16] *See* 34 C.F.R § 104.12(a) (2005) (requiring that recipients of federal funds

The ADA extended the Rehabilitation Act requirement to provide reasonable workplace accommodations to private employers. Small employers, those with less than fifteen employees, however, are excluded from coverage.[17] To be a covered individual, an employee or job applicant must be a "qualified individual with a disability."[18] To be qualified requires the employee have a defined ADA disability and be able to perform the essential job functions with or without the provision of reasonable accommodations.

Pertinent to accommodating employees, disability is defined primarily as having "a physical or mental impairment that substantially limits one or more of the major life activities of such individual."[19] Whether an individual has an ADA defined disability is dependent on the individual's limitations in "major life activities." "Major life activities" include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[20] Although working is listed as a major life activity

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"make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program or activity."); *see also* 34 C.F.R. § 104.3(1)(1) (2005) (defining "qualified handicapped person" as "a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question").

[17] *See* ADA, 42 U.S.C. § 12111(5) (2000) (defining "employer" as "a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person" and exempting from the classification of employer "the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or . . . a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of title 26."); *see also* Clackamas Gastroenterology Assocs. v. Wells, 538 U.S. 440, 448-51 (2003) (applying the EEOC's definition of employee to physician-shareholders to determine if a clinic qualified as an employer under the ADA); BLANCK, *supra* note 2 at 159 (discussing Title I covered employers).

[18] *See* ADA § 12111(8) (defining "qualified individual with a disability").

[19] ADA § 12102(2)(A). The ADA definition of disability also includes those with a record of an impairment or those who are regarded as having an impairment. ADA § 12102(2)(B)-(C). However, these situations are unlikely to require workplace accommodations to complete the essential functions of a job.

[20] 28 C.F.R. § 35.104 (2005). Additionally, the Supreme Court has held that

in the legislation, simply having a work limitation in one job may not constitute a disability for purposes of the ADA.[21] To date, the federal courts are split as to whether individuals "regarded as" having a disability or those "with a record of" a disability are ensured workplace accommodations under the ADA.[22]

As mentioned, if an individual is a qualified individual with a disability for purposes of the ADA, the employer is required to provide accommodations, unless doing so would impose an undue hardship for the business.[23] Figure 1 summarizes this decision process.[24]

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reproduction and childbearing are major life activities under the ADA. Bragdon v. Abbott, 524 U.S. 624 (1998).

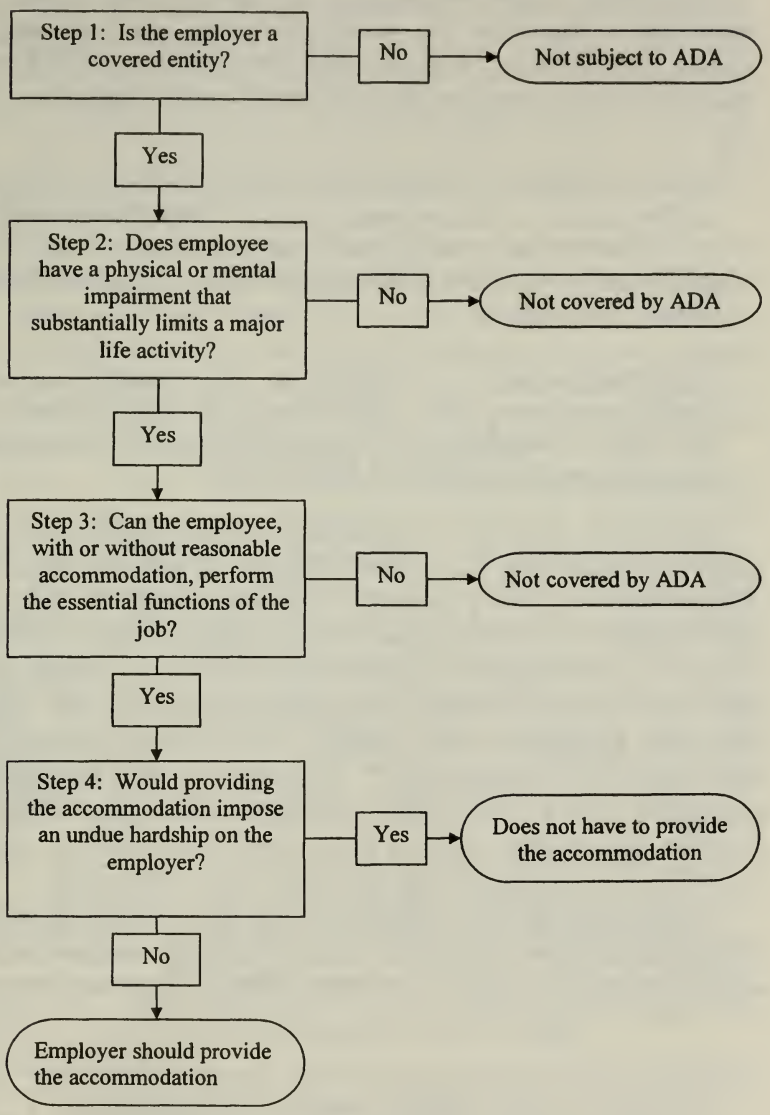
[21] *See* Toyota Motor Mfg. v. Williams, 534 U.S. 184, 198 (2002) (questioning whether work should be considered to be a major life activity).

[22] *Compare* Weber v. Strippet, Inc., 186 F.3d 907, 916 (8th Cir. 1999) (reasoning that requiring employers to accommodate employees who are only regarded as having a disability "would lead to bizarre results"), *and* Mack v. Great Dane Trailers, 308 F.3d 776, 783 n.2 (7th Cir. 2002) (noting the split in circuits and deciding not to address the issue), *and* Workman v. Frito-Lay, Inc., 165 F.3d 460, 467 (6th Cir. 1999), *and* Newberry v. E. Tex. State Univ., 161 F.3d 276, 280 (5th Cir. 1998) (holding that employers do not have to accommodate employees who they only think have an impairment), *and* Barnes v. Nw. Iowa Health Ctr., 238 F. Supp. 2d 1053, 1090 (N.D. Iowa 2002) (holding that an employer is not required to provide accommodations for employee who has a record of a disability and is not "actually disabled" under the ADA), *with* Katz v. City Metal Co., 87 F.3d 26, 33-34 (1st Cir. 1996) (reasoning that the statutory language defining a qualified individual under the ADA does not distinguish between individuals who are regarded as having a disability and those who have an actual disability), *and* Hartog v. Wasatch Acad., 129 F.3d 1076, 1084 (10th Cir. 1997) (stating that reasonable accommodations need not be provided for non-disabled individuals who have a relationship or association with a disabled person).

[23] ADA §§ 12112(b(5)(A).

[24] The ADA requires that reasonable accommodations be provided to job applicants as well as current employees. This discussion is limited to current employees.

Figure 1: Workplace Accommodation Decision Process under the ADA



Whether an accommodation defined under the ADA is "reasonable" is determined on a case-by-case basis and by example.[25] Relevant to accommodating current employees, Equal Employment Opportunity Commission (EEOC) regulations provide examples of reasonable accommodations, including:

> (ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or
>
> (iii) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.[26]

However, just as the outcome of any legal case is determined by the facts, the reasonableness of the accommodation is determined by the particular circumstances of the employee and employer. For example, working from home has been considered a reasonable accommodation for a computer programmer who could maintain his productivity, but not reasonable for other employees who require more direct co-employee collaboration and supervision.[27] Inherent in this example is the principle that a reasonable accommodation may alter, within bounds, the way in which a job is performed *without* altering or reducing the expected and essential work outcomes.

Alternatively, one employee may be allowed to start work early and end work earlier in the day for medical or therapy appointments (i.e., flex-time scheduling). That employee would

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[25] *See* ADA § 12111(9) (defining reasonable accommodations).

[26] 29 C.F.R. § 1630.2(o)(1)(ii)(iii) (2004).

[27] *Compare* Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538, 544-45 (7th Cir. 1995) (holding unreasonable an accommodation request to work full-time at home), *with* Langdon v. Dep't of Health and Human Servs., 959 F.2d 1053, 1060-61 (D.C. Cir. 1992) (holding that an accommodation request to work full-time from home was reasonable for a computer programmer).

work the same number of hours and, therefore, maintain production, but would work at a different time than other employees, assuming the schedule change would not impact essential job functions such as interacting with customers. Likewise, rather than using a standard telephone, one employee with a hearing impairment may be provided TTY/TDD access and use a relay service to communicate with customers, business associates, or other employees.

The ADA does not require a workplace accommodation be financially justified, nor does it allow for a cost-benefit analysis to justify the individual employee's value to the organization. The ADA permits denial of an accommodation when it creates an undue hardship, that is, it is not reasonable under the circumstances.[28] Undue hardships are those accommodations which require "significant difficulty or expense."[29]

The ADA outlines factors to be considered in determining whether providing an accommodation would be an undue hardship. Such factors include as the nature and cost of the accommodation, the financial resources of the facility making the accommodation and number of persons employed on expenses and resources of the facility, the type of operation of the employer, and the impact of the accommodation on the business.[30] Thus, in determining reasonableness, although net cost of the accommodation may be one factor, it is balanced by size of the employer and the resources available to the employer.[31]

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[28] EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ENFORCEMENT GUIDANCE: REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT (2000), *available at* http://www.eeoc.gov/policy/docs/accommodation.html (last visited Mar. 23, 2006) [hereinafter EEOC]; *see also* Morton v. United Parcel Serv., Inc., 272 F.3d 1249, 1257 (9th Cir. 2001) (restricting reasonable accommodations to those which do not impose an undue hardship).

[29] ADA § 12111(10)(A).

[30] EEOC, *supra* note 28; *see also* ADA § 12111(10)(B); 29 C.F.R. § 163(p)(2), pt. 1630 app. § 1630.2¶ (2004).

[31] *See* Lovejoy-Wilson v. NOCO Motor Fuel, Inc., 263 F.3d 208, 221 (2d Cir. 2001) (comparing the difficulty of the accommodation to the size of the employer and the resources available to it); *see also* EEOC, *supra* note 28 (arguing that net cost of the accommodation to the employer should take into consideration funding from outside sources, such as state rehabilitation agencies, tax credits or deductions and, when appropriate, resources from the disabled individual).

An accommodation that might be prohibitively expensive for a small business may not be so for a large corporation.

Some critics[32] have argued that the ADA's accommodation provision creates an employment privilege or subsidy for individuals with disabilities. Although the factors for determining whether an accommodation is an undue burden do not include benefits to the company, such critics presume, all else being equal, the net costs of accommodations typically exceed the benefits to employers and individuals with disabilities.[33]

Yet, prior studies show the costs associated with employee turnover and workplace injury tend to outweigh the direct costs associated with accommodation.[34] When an accommodation has no net cost to the employer, an employer should be willing to provide the accommodation regardless of legal requirements because the net benefit to the employer is a more productive and loyal employee.[35] Our prior research[36] and that of others shows workplace accommodations are typically low cost, effective, and net beneficial for employers.

Building on our previous studies,[37] we explore here new empirical evidence on the accommodation decision making process. Described in detail elsewhere,[38] the present analysis is based on the nationwide sample of employers who contacted

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[32] *See* CAROLYN L. WEAVER, *Incentives Versus Controls in Federal Disability Policy*, *in* DISABILITY AND WORK: INCENTIVES, RIGHTS AND OPPORTUNITIES 3-17 (Carolyn L. Weaver ed., 1997).

[33] *See generally* Peter David Blanck, *The Economics of the Employment Provisions of the Americans with Disabilities Act: Workplace Accommodations*, *in* EMPLOYMENT, DISABILITY, AND THE AMERICANS WITH DISABILITIES ACT: ISSUES IN LAW, PUBLIC POLICY, AND RESEARCH 201 (Peter David Blanck ed., 2000) (discussing economic models of the ADA).

[34] Peter David Blanck, *The Economics of the Employment Provisions of the Americans with Disabilities Act: Workplace Accommodations*, 46 DEPAUL L. REV. 877 (1997).

[35] *See* Ellen S. Fabian, et al., *Reasonable Accommodations for Workers with Serious Mental Illness: Type, Frequency, and Associated Outcomes*, PSYCHOSOCIAL REHABILITATION J., Oct. 1993, at 163 (reporting that providing accommodations was significantly and positively correlated with employee tenure).

[36] Schartz, *supra* note 4; *see also* Hendricks, *supra* note 4.

[37] *See* Schartz, *supra* note 4; *see also* Hendricks, *supra* note 4.

[38] *See* Hendricks et al., *supra* note 4 (describing sample characteristics and methodology in more detail).

the Job Accommodation Network (JAN) about workplace accommodations. Because the majority of employers in the sample requested information concerning a current employee, we have restricted the present analysis to those cases.

III. Evidence of Accommodation Determinations—The JAN Interview Study

In partnership with JAN and the Burton Blatt Institute, the Law, Health Policy, and Disability Center has been conducting follow-up telephone interviews of JAN customers to assess their business needs and the practical usefulness of the accommodation solutions discussed.[39] JAN is a free consulting service, funded by the U.S. Department of Labor's Office of Disability Employment Policy (ODEP). It provides individual consultations about workplace accommodation solutions, self-employment options, and technical assistance about disability-related legislation.[40] JAN serves large and small employers; individuals with disabilities; rehabilitation, medical, and legal professionals; and families and friends of individuals with disabilities.

A. *The Interviews*

The interviews conducted for this study include a series of forced-choice and open-ended questions. Separate interview scripts are prepared for each group (e.g., employers; individuals with disabilities; rehabilitation, medical, and legal professionals; families and friends of individuals with disabilities; and others). Participants answer demographic and disability-related questions about the person who is the subject of the consultation, along with questions about the accommodations considered and about the company. For accommodations implemented, employers are asked about the direct and indirect costs and benefits and the effectiveness of the accommodations. Questions about satisfaction with and effectiveness of the JAN ser-

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[39] *See* Hendricks, *supra* note 4; *see also* Schartz, *supra* note 4.

[40] Job Accommodation Network, *available at* http://www.jan.wvu.edu/ (last visited on Oct. 5, 2005).

vices are included in the interview scripts. Interviews take place between forty-five and sixty days after the JAN consultation in order to give employers time to consider and possibly implement accommodations.

The data reported here are derived from a subset of follow-up interviews that took place between January 2004 and June 2005 with employers who consulted JAN about accommodating a current employee. The majority of JAN consultations about accommodation solutions come from employers.[41] Of the 1241 employer contacts provided by JAN, 890 completed the interview, resulting in a 71.7% completion rate.[42] Of the 890 interviews, the majority (75.2%) were employers requesting information about accommodating a job applicant or current employee. Other calls were for information about the ADA, other laws, or company policies.[43]

Of the consultations concerning workplace accommodations, the vast majority concerned accommodating a current employee. More than three-fourths (82.4%) of these consultations focused on retaining an employee and an additional 1.8% concerned promoting a current employee. Accommodation inquiries for job applicants made up a small percentage of the sample (4.6%), as did inquiries about hiring new employees (1.6%). Some inquiries did not concern a particular employee, but rather, involved a company-wide issue (4.5%). The analyses below are restricted to employer consultations concerning accommodations for retaining or promoting a current employee.

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[41] Hendricks, *supra* note 4.

[42] Participants for the follow-up interviews were initially recruited by JAN consultants. At the end of the individualized consultation, the JAN consultants offer the caller an opportunity to participate in a follow-up interview. Participation in the interview is voluntary. These callers are contacted by LHPDC approximately forty-five to sixty days after the consultation, allowing time for employers to decide on and possibly implement accommodation solutions.

[43] Of the 890 employer interviews, 665 (74.7%) requested information on the ADA or other disability legislation or company policies. Most calls (52.6%) concerned multiple requests, including both information on accommodating an applicant or employee and legislation or policy information.

B. The Employees

Employers reported demographic information on the employees who were the subject of the consultation. The "typical" employee was female, a high school graduate, and in her mid-forties to mid-fifties. On average, the employee worked for the company about seven years and earned $36,000 per year. We found that these employers likely viewed the employee at issue as having substantial limitations of non-work and work activities.

Specifically, employers requested JAN's assistance with accommodations for substantially more female (60.9%) than male (39.1%) employees.[44] Employees were likely to be in their mid-forties to mid-fifties (24.7%), mid-thirties to mid-forties (22.6%), or mid-twenties to mid-thirties (15.8%). The oldest employees in the sample (more than fifty-five years of age, 10.0%) and youngest (less than twenty-six, 5.2%) were less likely to be the subject of the consultation. Employees discussed were likely to have a high school diploma or GED (38.6%) or a college degree (28.5%). Few had an Associate's Degree (12.2%), a graduate or professional degree (12.2%), only a high school certificate (5.9%), or did not complete high school (2.7%).

On average, employees that were discussed had worked with the company for more than seven years (i.e., mean 7.7 years, median 5.0 years, range of less than one year to thirty-eight years). Annual wages ranged from $1,560 to $135,000 with a mean of $36,128.[45] As predicted, higher annual wages were significantly correlated with employee's age, gender (with male employees), level of education, and company tenure. Table 1 displays the intercorrelations among the employee demographic variables.[46]

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[44] In subsequent analyses, we will examine job type and income levels (among other factors) as functions of gender to assess this accommodation rate difference.

[45] Sample size (N) = 332.

[46] Employee demographic variables were compared using Pearson Correlations. A Pearson Correlation (r) is a statistical measure of the linear relationship between two variables. It can range from +1, perfect positive linear relationship, to

Table 1: Intercorrelations of Employee Demographic Variables

Employee Demographic Variables		Number of years with the company	Highest level of education (C)	Gender (C)	Age (C)	Annual Wages or Salary
Number of years with the company	Pearson Correlation	1	.083	.034	.454(**)	.402(**)
	N	472	318	465	412	322
Highest level of education (C)	Pearson Correlation		1	.005	.077	.616(**)
	N		337	335	306	238
Gender (C)	Pearson Correlation			1	-.022	-.152(**)
	N			542	437	330
Age (C)	Pearson Correlation				1	.206(**)
	N				440	303
Annual Wages or Salary	Pearson Correlation					1
	N					332

Notes: ** Correlation is significant at the 0.01 level (2-tailed).
* Correlation is significant at the 0.05 level (2-tailed).
(C) Categorical variable.
Gender coded 1 for males and 2 for females.

Mirroring the ADA's definition of disability, employers were asked whether the employee at issue had a physical, mental, or other health condition that substantially limited a major life activity. Separate questions were asked for substantial limitations in major life activities other than working, such as breathing, thinking, walking, talking, seeing, hearing, and so on, (i.e., a non-work related, but ADA covered disability), and the kind and amount of work limitation.

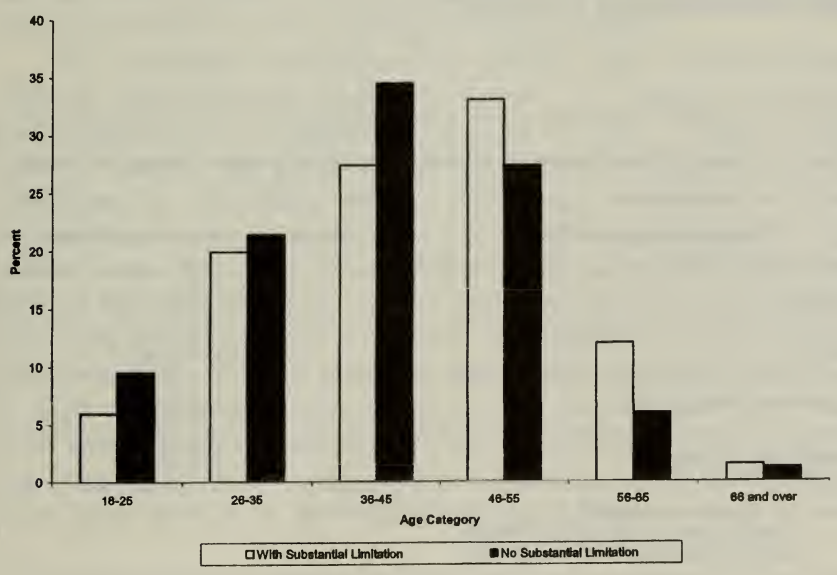
Of the 521 employers who reported on an employee's limitation, the majority (79.7%) of employees had substantial limitations in a major life activity (either work related, non-work related, or both). For purposes of these analyses, employees with substantial limitations, either in work or non-work major life activities, were considered to meet the ADA disability definition. Thus, employees were classified based on whether the

-1, perfect negative linear relationship.

employer regarded them as having a substantial limitation of a major life activity and thus, a person with a disability for purposes of the ADA.

As expected, disability status was associated with age.[47] Employees with substantial limitations were more likely to be older, in their mid-forties to mid-fifties, compared to those without substantial limitations. Figure 2 provides the distribution of employees by age and disability status. Importantly, disability status was not significantly related to other employee demographic variables such as race or gender.

Figure 2: Distribution of Employees With and Without Substantial Limitations by Age



[47] Pearson correlation (r) = .097, $p < .05$, N = 416.

C. Company Demographics

A range of employers participated in the interviews. Company size ranged from small (e.g., five employees) to those with almost one million employees. The mean company size was large, with 13,652 employees. The median company size was 1300 employees. Pertinent to whether they are subject to ADA requirements, the majority (98.3%) had fifteen or more employees; a few (1.7%) had less than fifteen employees. One-third (30.9%) had consulted with JAN before.

Company size, as a function of number of employees, was significantly related to employee gender ratios and wages (i.e., larger companies had a higher percentage of male employees and paid higher wages, relative to smaller companies). Table 2 summarizes these correlations between company size and employee demographic variables.[48]

Table 2: Correlations Between Number of Employees In Company and Employee Demographic Variables

Employee Demographic Variables	Number of employees in the company
Gender (C)	$r(499) = -.106$, $p < .05$
Age (C)	$r(411) = -.046$, n.s.
Highest level of education (C)	$r(312) = -.044$, n.s.
Annual Wages or Salary	$r(310) = .129$, $p < .05$

Notes: (C) Categorical variable.
Gender coded 1 for males and 2 for females.
Numbers in parentheses are sample sizes.

[48] Sub-analyses found that the size of company positively correlated with wages for female employees ($r = .188$, $p < .05$, $N = 175$) but not for male employees ($r = .095$, n.s., $N = 133$.) In other words, female employees working in larger companies have relatively higher wages than females working in smaller companies.

D. Accommodation Decisions

For more than half of the consultations, workplace accommodations were made subsequent to the consultation with JAN. Of the 540 employers who provided feedback, accommodations had been made (or were pending implementation) after more than half (55.2%) of the consultations. Accommodations had not been made in 44.8% of the cases.

The prevalent reason reported for not making an accommodation was that the company determined it was not required under the ADA or another law (58.5%). In other cases, the decision to accommodate was pending (19.9%) at the time that the employer was interviewed. In fewer cases, the accommodation had been rejected (15.4%) or the employee decided it was not necessary (2.5%). In less than one percent of cases (0.4%), an accommodation was reported as not possible.

The reported reason for not making the accommodation differed depending on disability status (i.e., having a substantial limitation on a major life activity or not).[49] Table 3 summarizes employers' given reasons for not providing the accommodation by disability status. Follow-up statistical analysis reveal that accommodation-decision differences by disability status were functions of employees without substantial limitations being more likely to have decided that the accommodation was not necessary, compared to employees with substantial limitations.[50] One possible explanation for this difference is that employees without substantial limitations may have been more likely to have short-term impairments (e.g., recovering from surgery or complications in pregnancy) that would not have been seen to be covered under the ADA.

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[49] Chi-square test for independence (χ^2) is a nonparametric statistical test used to determine if there is a relationship between two variables using frequency data. Comparison of reasons accommodation was not made by employee status, χ^2 (5, N = 213) = 14.194, $p < .05$.

[50] "Determined not needed by employee" compared to aggregate of all other reasons, χ^2 (1, N = 213) = 10.082, $p < .01$.

Table 3: Reason Accommodation Was Not Made by Employee's Disability Status				
Reason Accommodation Was Not Made		Substantial Limitation of a Major Life Activity		Total
		Yes (n = 156)	No (n = 57)	
Accommodation was rejected	Count	26	7	33
	Percent	16.7%	12.3%	15.5%
Decision is still pending	Count	31	5	36
	Percent	19.9%	8.8%	16.9%
Determined not required by ADA or other law	Count	93	38	131
	Percent	59.6%	66.7%	61.5%
Determined not needed by employee	Count	1	5	6
	Percent	.6%	8.8%	2.8%
Not possible to accommodate	Count	1	0	1
	Percent	.6%	.0%	.5%
Other reason	Count	4	2	6
	Percent	2.6%	3.5%	2.8%

E. Factors Associated with Accommodation Decision

Under the ADA, the decision to accommodate is made for an employee with a covered disability. A substantial limitation of a major life activity is one requirement of the ADA's definition of disability. Therefore, an employer's report or perception of whether the employee at issue has a substantial limitation should predict, in part, whether an accommodation actually was made. Under the ADA, employers are not required to provide accommodations for individuals who are not defined as having a disability (i.e., a substantial limitation of a major life activity).[51]

[51] Some of these employees may have qualified for protection under the ADA

As expected, accommodations were most likely to be made for employees who were considered to have a substantial limitation of a major life activity.[52] Accommodations were made in more than half (61.2%) of the 402 consultations for employees with substantial limitations. Though representing significantly fewer cases, accommodations were made in a considerable number of cases (42.6% of 101) for employees whom the employer reported did not have a substantial limitation of a major life activity.

Under the ADA, employers are required to provide reasonable accommodations only for *qualified* employees with covered disabilities (i.e., employees who can perform the essential functions of the job with or without accommodations).[53] For employees with work-related substantial limitations, employers were asked to rate the employee's functional limitations both with and without accommodations. We hypothesized that employers' decisions to accommodate would be related to employees' functioning with, rather than without, accommodations. As mentioned, under the ADA, an employer is required to provide a reasonable accommodation to an employee who can do essential job functions given the accommodation.[54] An employer would not be required to provide a reasonable accommodation if the employee could not perform the essential functions even with the accommodation. Assuming employers were adhering to the ADA analysis, the decision to accommodate should not be based on the employee's ability to work without accommodations; rather it should be based on the employee's essential job abilities with accommodations.

As predicted, whether an accommodation was made significantly correlated with employers' ratings of the employee's functional ability to work *with* accommodations. Using a 5-point scale with 1 as "not limited" and 5 as "substantially limit-

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because they were "regarded as" or had "a record of" a disability. *See* ADA, 42 U.S.C. § 12102(2) (2000) (defining disability). Other employees may have been covered by state laws.

[52] $\chi^2(1, N = 503) = 11.449, p < .01$.

[53] ADA, 42 U.S.C. § 12112(b)(5)(A) (2000).

[54] *Id.*

ed," employers rated the particular employee's functional ability to work with and without accommodations. We found that employers rated employees as significantly less limited in their ability to work with accommodations than without.[55] The rating of an employee's functional ability to work given accommodations therefore is related significantly to whether an accommodation was made.[56] In other words, employers were more likely to provide accommodations for individuals whose work limitations were mitigated by the accommodations. Conversely, they were less likely to provide accommodations if they reported the employee to be substantially limited even with the accommodations. Consistent with the ADA definition, provision of accommodation was not associated with the employee's work-related functional limitations without accommodations.[57]

To determine whether other factors, potentially not relevant to the ADA, related to the provision of accommodations subsequent to the JAN consultation, the variable "Accommodation Decision" (i.e., yes or no) was correlated with demographic and company variables. As expected, employee demographic variables and company variables were not significantly related to whether an accommodation was made. Moreover, accommodation decisions were not related to employee age, gender, education, annual salary or wages, or years with the company. The accommodation provision was not significantly correlated with the size of the company or whether the employer had previously contacted JAN. Table 4 summarizes these findings.

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[55] Mean rating of functional limitation without accommodations was 3.69, and mean rating with accommodations was 2.19, Paired Samples t-test (252) = 19.124, $p < .001$. A t-test is a statistical test used to determine if there is a significant difference between the means of two variables. The Paired Samples version is used when the samples are related. In this case, the samples are related because it is a repeated measures design.

[56] Pearson correlation (r) = .224, N = 251, $p < .001$.

[57] Pearson correlation (r) = .051, N = 283, n.s.

Table 4: Pearson Correlation Coefficients Between Whether an Accommodation Was or Was Not Made and Employee and Company Demographic Variables

	Accommodation Made or Pending Implementation (Yes=1 or No=2)
Employee's age (categorical)	r (432) = -.028, n.s.
Employee's gender (1=male, 2=female)	r (527) = -.014, n.s.
Employee's highest level of education (categorical)	r (334) = -.041, n.s.
Annual Salary or Wage	r (328) = -.058, n.s.
Number of years employee has been with the company	r (465) = -.047 n.s.
Number of employees in company	r (502) = -.008, n.s.
Employer previously contacted JAN (1=yes, 2=no)	r (540) = .050, n.s.

Notes: Number in parentheses are sample size.

F. Accommodation Direct Costs and Benefits

To further assess the reasons why employers provide workplace accommodations to employees without "substantial limitations," we analyzed employer reports of direct costs and benefits associated with providing the accommodations. Cost and benefit data were available only in those situations in which the employer had decided to provide the accommodation. Of the respondents who made an accommodation, 226 were able to provide the actual or estimated direct cost of the accommodation.

Costs were classified by type of cost: no cost, one-time, annual, or both one-time and annual costs. To include both one-time and annual cost estimates, a First Calendar Year Direct Accommodation Cost was calculated using the one-time cost reports and one year's worth of the annual cost reports. We found that approximately half (49.1%) of the accommodations made had no cost. Almost three-quarters (74.8%) had a

First Calendar Year Direct Cost of $500 or less. Of the 115 that had a cost, the median First Calendar Year Cost was $500.

The First Calendar Year Direct Accommodation Cost was associated with disability status. Accommodations for employees with substantial limitations of a major life activity were significantly more expensive than those for employees without substantial limitations.[58] The proportion of accommodations without a cost did not differ by disability status.[59] However, for accommodations that had a cost, the median accommodation cost for employees with substantial limitations was $629, which was significantly greater than the median of $100 for employees without substantial limitations. Table 5 summarizes these findings.

Table 5: Calendar Year Direct Cost Estimates for Workplace Accommodations by Disability Status[60]

Employee Disability Status	Percent of Accommodations with No Cost	Median Cost for Accommodations with a Cost
Substantial Limitation of Major Life Activity	47.8% (n = 186)	$629 (n = 97)
No Substantial Limitation of Major Life Activity	58.3% (n = 36)	$100 (n = 15)

[58] First Calendar Year Direct Accommodation Cost data were positively skewed because of the high frequency of zero responses. Therefore, data were transformed using ln (x + 1) to reduce the skewness of the data. Groups were compared using an independent samples t-test, $t(57.75) = 2.336$, $p < .05$. The independent samples version is used when the two samples are not related.

[59] χ^2 (1, N = 222) = 1.326, n.s.

[60] The cost estimates presented in Table 5 are only for accommodations made and not for those rejected.

The results suggest that for employees without substantial limitations, presumably individuals for whom employers may not have an ADA obligation to provide accommodations, employers may be willing to provide accommodations when the costs are low. For employees without ADA defined disabilities, more expensive accommodations may be rejected by the employer at higher rates.

Almost all employers reported that providing the accommodation benefited the company by allowing it to retain (91.6%) and/or promote (11.3%) a qualified employee. Other direct benefits reported included eliminating the cost of training a new employee (59.5%), saving on worker's compensation or insurance costs (43.0%), increasing the accommodated worker's productivity (76.7%), improving the accommodated worker's attendance (53.3%), increasing the diversity of the company (41.4%), and "other" direct benefits (20.1%).

Of the eighty-three employers who provided monetary estimates, more than half (57.8%) reported their company benefited more than $1,000 from providing the accommodation. The median or typical direct benefit to the company was $1,800. Direct benefit estimates ranged from $0 to $100,000.

Of the seventy-five employers who provided benefit and cost estimates, net benefit was calculated from estimated direct benefits minus calendar year direct cost estimates. For the majority (81.3%) of these employers, the estimated benefits of providing the accommodation offset the costs of the accommodation. For over half (61.3%), net benefits were positive, meaning that the benefits gained from providing the accommodation outweighed the cost of the accommodation. For one-fifth (20.0%), benefits were equal to the cost of the accommodation. For the remaining 18.7%, accommodation costs exceeded benefits to the company.

Although estimated direct benefit did not differ by type of limitation,[61] there was a trend for net benefits to be greater

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[61] Direct benefit data were positively skewed. Therefore, data were transformed using ln (x + 1) to reduce the skewness of the data. Groups were compared using an independent samples t-test, $t(77) = 1.258$, n.s.

for accommodations for employees with substantial limitations than for those without substantial limitations.[62] Further analyses revealed that benefit differences occurred for accommodations with zero cost and not for those with greater than zero cost. For accommodations with no cost, direct benefit estimates were significantly greater for employees with substantial limitations compared to those without. For the subset of accommodations which had no cost, the median benefit for accommodating employees with a disability was $3500 compared to a median of $0 for accommodating employees without a disability. Because there was no cost to the accommodation, the employer received the total benefit. For accommodations with a cost, neither direct benefits nor net benefits differed for employees with, compared to those without, substantial limitations.[63]

Direct benefits estimates were not significantly related to employee demographics, company size or calendar year direct costs. Not surprisingly, net benefits were significantly associated with wages.[64] In other words, the company reported greater net benefits associated with accommodating those employees with higher wages. Employees with higher wages likely are more expensive to replace (e.g., recruitment, training, and start-up costs may be greater), and in providing accommodations, the employer avoids those costs and realizes a greater net benefit.

IV. Conclusions and Implications

The present study's core findings may be summarized as follows:

1. Consistent with the ADA's requirements, current employees with substantial limitations of major life activities are substantially more likely to receive accommodations, compared to

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[62] χ^2 median test (1, N = 73) = 3.425, p = .064. This statistical test uses a chi-square to compare frequency of scores greater than median to those less than median for two groups.

[63] Independent samples t-test on transformed direct benefit data, equal variances assumed, t (34) = -.711, n.s.

[64] Pearson correlation (r = .402, p < .005, N = 59). Independent samples t-test on net benefits, equal variances assumed, t (34) = .330, n.s.

those without substantial limitations.

2. Employers are more likely to provide accommodations for employees whose work-related limitations are mitigated by effective accommodations.

3. Factors not relevant to the ADA accommodation decision process (e.g., age, gender, job tenure, and wage level) did not predict the provision of accommodations.

4. Employers provided accommodations to a substantial number of employees who did not meet the ADA's definition of disability.

5. Accommodations for employees without substantial limitations cost less than those provided to employees with substantial limitations.

6. Overall, accommodation costs are low and benefits relatively high.

The present results, perhaps the first of their kind, provide strong construct validity (i.e., observations that fit the theory) for the rationale underlying the ADA's accommodation process.[65] If replicated, the findings suggest employer accommodation decisions largely are based on factors consistent with the ADA model—a focus on employees with substantial limitations of a major life activity, and on the ability to perform essential job functions with the provision of accommodations. Demographic factors that are not directly relevant to the accommodation process (e.g., gender or age) did not predict the provision of accommodations.

Employers provided accommodations to a considerable number of employees who did not meet the substantial limitation requirement under the ADA. In this study, almost half (43%) of accommodated employees did not have substantial limitations of a major life activity. Certainly, a number of these employees may have been covered by the ADA because they were regarded as having a disability or had a record of a dis-

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[65] *See* KENNETH S. BORDENS & BRUCE B. ABBOTT, RESEARCH DESIGN AND METHODS: A PROCESS APPROACH (2d ed., 1991) (defining construct validity as a means to assess how well the data fit a hypothetical construct).

ability.[66] In other cases, employers may have been required to provide accommodations under a state law that exceeded the ADA's requirements.[67] Although those factors may account for a subset of these cases, it is likely that employers perceive the net benefit from accommodation, especially if the cost of the accommodation is relatively low and the cost of turnover is high. Although the accommodation process does not turn on a cost-benefit analysis, employers clearly seem to be considering costs and benefits when providing accommodations to an individual without a covered disability.[68]

For employees without substantial limitations, the findings are more in line with employers performing a cost-benefit analysis. Accommodations provided to employees without substantial limitations were found to cost relatively less than those provided to employees with substantial limitations. Of course, employers are not required under law to provide accommodations to all employees; in the context of the ADA, employers are required to provide accommodations only to those qualified employees with defined disabilities. Employers are free to reject or dismiss requests from non-disabled employees, and they are likely do so at a great rate, especially for costlier accommodations. It may also be that employees without substantial limitations tend not to request accommodations (or at least not costlier ones), believing they do not have a legal basis for the request.

Further research is needed to examine the reasons employers choose to accommodate disabled and non-disabled employees and what factors govern those decisions. In addition, more

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[66] *See* ADA, 42 U.S.C. § 12102(2)(B)-(C) (2000).

[67] *See, e.g.*, California Fair Employment and Housing Act, CAL. GOV'T CODE §§ 12900-12996 (West 2005) (prohibiting discrimination based on disability by public and private employers and requiring reasonable accommodations); *see also* CAL. GOV'T CODE § 12926(k)(1)(B)(i) (West 2005) (defining physical disability as a condition that "limits" rather than substantially limits a major life activity).

[68] *See* Seth D. Harris, *Law, Economics and Accommodations in the Internal Labor Market* (Jan. 17, 2006) *in* NYLS Legal Studies Research Paper No. 05/06-13, *available at* http://www.ssrm.com/abstract=876648 (last visited Apr. 18, 2006) (arguing that employers benefit from accommodating current employees based on internal labor market theory).

research is needed to assess who asks for accommodations and why. Outcomes to assess include the provision of accommodations and net cost or benefit to the employer.

Lastly, our findings continue to support the general conclusion that most accommodation costs are low and the resultant benefits relatively high. Almost half of the accommodations studied here were made at no cost for current employees with ADA defined disabilities and more than half for current employees without reported substantial limitations. Employers themselves report substantial benefits from the provision of accommodations.

The present line of study lends itself to use in employer ADA awareness programs to convey the low costs and high benefits of accommodating qualified individuals with disabilities. Despite such findings that accommodations are inexpensive and effective, many qualified individuals with disabilities remain unemployed because of an unwillingness on the part of employers to accommodate. Those employers in this study who contacted JAN may not be representative of many others who chose not to engage in the accommodation process.

As employers continue to provide effective accommodations at low cost with a significant positive return on the investment, there may be a growing willingness to make accommodations. Future studies will continue to refine and document the "business case" for accommodations. As employers and persons with disabilities recognize the potential value of workplace accommodations, employment rates may improve for all qualified individuals.

DISABILITY AND EMPLOYMENT DISCRIMINATION AT THE REHNQUIST COURT

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Michael E. Waterstone[**] & Michael Ashley Stein[***]

INTRODUCTION

This symposium celebrates, examines, and raises challenges on the fifteenth anniversary of the Americans with Disabilities Act (ADA).[1] It also presents an opportunity to consider another important legal milestone, namely, the end of the Rehnquist Court.[2] While it is too early to fully assess its twenty-year legacy, much attention has already been paid to that Court's federalism jurisprudence.[3] Receiving less scrutiny

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[1] 42 U.S.C. §§ 12101-12213 (2000).

[2] The late Honorable William H. Rehnquist was appointed as Chief Justice of the United States Supreme Court in 1986. *See* U.S. Supreme Court Justices, *available at* http://www.oyez.org/oyez/resource/legal_entity/100/ (last visited Mar. 6, 2006).

[3] *See, e.g.*, JOHN T. NOONAN, JR., NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES (2002); Evan H. Caminker, *"Appropriate" Means-Ends Constraints on Section 5 Powers*, 53 STAN. L. REV. 1127, 1131 (2001) (noting additional pressure new federalism puts on Congress to legislate pursuant to its Section 5 powers); Roderick M. Hills, Jr., *The Eleventh Amendment as Curb on Bureaucratic Power*, 53 STAN. L. REV. 1225, 1225-26 (2001) (arguing that the Rehnquist Court's jurisprudence serves the public interest by maintaining a damages versus injunction distinction that serves as a check on public agencies); Vicki C. Jackson, *Principle and Compromise in Constitutional Adjudication: The Eleventh Amendment and State Sovereign Immunity*, 75 NOTRE DAME L. REV. 953 (2000) ("The Court's Eleventh Amendment and sovereign immunity case law de-

has been the Rehnquist Court's general pattern of favoring plaintiffs in race and sex-based employment discrimination cases, while being decidedly pro-defendant in the parallel context of disability-related claims.[4]

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serves the condemnation and resistance of scholars.").

[4] For Title VII, pro-employee cases, see Bazemore v. Friday, 478 385 (1986) (holding that statistical studies of salary discrimination are relevant for purposes of proving discrimination); *see also* Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988) (holding that subjective or discretionary employment practices can be analyzed under disparate impact framework); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (holding that when a Title VII plaintiff demonstrates that gender played a motivating part in an employment decision, the defendant could avoid a finding of liability only by proving by a preponderance of the evidence that it would not have made the same decision even if it had not taken the plaintiff's gender into account); Robinson v. Shell Oil Co., 519 U.S. 337 (1997) (holding that term "employees" in Title VII must include former employees); Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003) (holding that an employee does not need to present direct evidence for reasonable jury to conclude that an employment practice was illuminated by a discriminatory motivating factor). To be sure, a significant exception to the Rehnquist Court's broadening of Title VII rights was *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in* Raytheon Co. v. Hernandez, 540 U.S. 44 (2003), where the Court sharply restricted a plaintiff's ability to demonstrate, using the disparate impact proof structure, that an employer's policy favored whites over non-whites. Our point, however, is to identify trends and parallels. For ADA Title I pro-employer cases, see Sutton v. United Airlines, 527 U.S. 471 (1999) (holding that in considering whether an individual's impairment substantially limits one or more major life activities, courts should consider the individual in their mitigated state; moreover, under the "regarded as" prong of the definition of disability, an employer must view the individual as unable to work a class or range of jobs, not just one particular job); *see also* Murphy v. UPS, Inc., 527 U.S 516 (same); Toyota Motor Manufacturing, Kentucky v. Williams, 534 U.S. 184 (2002) (holding that in considering the major life activity of performing manual tasks, courts should only consider activities that are of central importance to most people's daily lives); Clackamas v. Gastroenterology Associates, P.C. v. Wells, 538 U.S. 440 (2003) (holding that clinic did not have requisite number of employees for ADA coverage because physicians were not employees); Albertson's Inc. v. Kirkinburg, 527 U.S. 555 (1999) (holding that an employer can show that an individual is not qualified for a job because that individual cannot meet a legitimate qualification standard, even if the standard is not, in and of itself, essential to the job); US Airways v. Barnett, 535 U.S. 391 (2002) (holding that ADA's reasonable accommodation requirement did not require employer to make exceptions to seniority system); Raytheon Co. v. Hernandez, 540 U.S. 44 (2003) (holding that employer's policy of refusing to rehire former employees who had violated its misconduct rules was a legitimate, non-disability-based reason); Board of Trustees v. University of Alabama v. Garrett, 531 U.S.

Various explanations have been proffered to explain this differential treatment. Some commentators aver a backlash against the disabled;[5] others point to the vague definition of disability contained in the statute.[6] Almost all scholars agree that as a civil rights statute, the ADA is viewed by courts differently than its predecessor, the Civil Rights Act of 1964 (Title VII).[7] Indeed, nearly all legal commentators, even those supportive of disability-based employment rights, concur with this position.[8] To quote one assessment: "the ADA is not an antidiscrimination law" for it mandates "firms to treat unequal people equally, thus discriminating in favor of the dis-

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356 (2001) (holding that state employers were not subject to damage suits under Title I of the ADA based on Eleventh Amendment principles of sovereign immunity). The one Rehnquist Court ADA Title I case that was decided in favor of the plaintiff was *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795 (1999) (holding that plaintiff who had claimed that she could not work in Social Security Disability Insurance application was not estopped from arguing she was disabled under ADA).

[5] *See generally* Symposium, *Backlash Against the ADA: Interdisciplinary Perspectives and Implications for Social Justice Strategies*, 21 BERKELEY J. EMP. & LAB. L. 1 (2000).

[6] *See* Robert L. Burgdorf, Jr., *"Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability*, 42 VILL. L. REV. 409, 415 (1997) (discussing the courts' misconstructions of the ADA's definition of disability); *see also* Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 BERKELEY J. EMP. & LAB. L. 91, 91-92, (2000); Arlene B. Mayerson, *Restoring Regard for the "Regarded As" Prong: Giving Effect to Congressional Intent*, 42 VILL. L. REV. 587, 587 (1997) (acknowledging "the narrowing construction of the definition of disability which thereby deprives qualified individuals of the opportunity to prove that they have been discriminated against in violation of the ADA"); Aviam Soifer, *The Disability Term: Dignity, Default, and Negative Capability*, 47 UCLA L. REV. 1279, 1299-1307 (2000) (discussing courts' restrictive interpretations of the "regarded as" definition); Bonnie Poitras Tucker, *The Supreme Court's Definition of Disability Under the ADA: A Return to the Dark Ages*, 52 ALA. L. REV. 321, 325-26 (2000) (detailing legislative history that supports determining disability without considering mitigating measures and the courts' contrary decisions).

[7] 42 U.S.C. §§ 2000e et seq. (2000).

[8] One commentator went so far as to use the term "canonical" to describe this view. *See* Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 643-44 (2001). For a detailed rebuttal, see Michael Ashley Stein, *Some Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PA. L. REV. 579 (2004).

abled."[9] This last, overarching issue is crucial for evaluating the ADA.

In this Article, we treat the convergence of the fifteenth anniversary of the ADA and the end of the Rehnquist Court (until recently, the only Supreme Court to adjudicate ADA issues)[10] as an opportunity to demonstrate how that Court took a lead in treating disability discrimination cases differently than those based on race and sex. We show that far from treating equal people equally, there are circumstances in which the Court has treated similarly situated nondisabled and disabled people differently, to the disadvantage of the latter.

To illustrate this point, we set forth the Rehnquist Court's approach to paternalistic notions that "protect" female workers and workers with disabilities by contrasting the assumptions underlying and influencing the decisions in *UAW v. Johnson Controls, Inc.*[11] with *Chevron U.S.A., Inc. v. Echazabal*.[12] Although the cases are not exactly parallel—notably, the governing legal standards differ—examining their respective methodologies provides insight into the Rehnquist Court's view that disability-based exclusion from the workplace is fundamentally different from exclusion on the basis of race or sex.[13] Put

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[9] Sherwin Rosen, *Disability Accommodation and the Labor Market*, *in* DISABILITY AND WORK: INCENTIVES, RIGHTS, AND OPPORTUNITIES 18, 21 (Carolyn L. Weaver ed., 1991).

[10] On January 10, 2006, the Roberts Court announced its first ADA decision. *See* United States v. Georgia, 126 S. Ct. 877, 882 (2006) (holding that "insofar as Title II creates a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity").

[11] 499 U.S. 187 (1991).

[12] 536 U.S. 73 (2002).

[13] Viewing race and sex discrimination as different from discrimination on the basis of disability predates the ADA. This position first emerged most prominently in *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446 (1985) (holding that state discrimination on the basis of disability receives rational basis review). For a discussion of *Cleburne* as demonstrating judicial hostility to disability-based discrimination claims, see Anita Silvers & Michael Ashley Stein, *From* Plessy *(1896) and* Goesart *(1948) to* Cleburne *(1985) and* Garrett *(2001): A Chill Wind from the Past Blows Equal Protection Away*, *in* BACKLASH AGAINST THE ADA: REINTERPRET-

another way, by contrasting the Court's varied methodologies, we make concrete Ronald Dworkin's famous observation that judges interpret law so as to fit and justify their choices from among the existing legal landscape.[14]

This article proceeds in four parts. Part I briefly sets forth the history and importance of paternalism and the law. Next, Part II describes the jurisprudential shift in the treatment of women over the course of the Twentieth Century from a model of paternalism to one that acknowledges women's equality and autonomy, culminating in the Court's decision in *Johnson Controls*. Part III turns to the different course of disability discrimination, setting forth each of the rulings in the *Echazabal* litigation, and critiquing the Court's opinion. In Part IV, we conclude by arguing that the Rehnquist Court's failure to reject paternalistic notions of "protecting" people with disabilities (in this case, from themselves) is inconsistent with its race and sex antidiscrimination jurisprudence, and misapprehends the larger purposes of the ADA.

I. PATERNALISM AND THE LAW

A standard dictionary definition of "paternalism" is "the care or control of subordinates (as by a government or employer) in a fatherly manner."[15] Historically, the phrase was used in reference to the government acting in the guise of one's actual father,[16] to secure its citizens' best interests.[17] Exten-

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ING DISABILITY RIGHTS (CORPOREALITIES: DISCOURSES ON DISABILITIES) 221 (Linda Hamilton Krieger ed., 2003) [hereinafter *Chill Wind*].

[14] Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1063 (1975) ("Lawyers believe that when judges make new law their decisions are constrained by legal traditions but are nevertheless personal and original.").

[15] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1654 (Philip Babcock Gove et. al. eds., 1986).

[16] The etymology is derived from the Latin word "pater," meaning father. *See* AMERICAN HERITAGE DICTIONARY 909 (2d ed. 1982).

[17] *See, e.g.*, 3 A DICTIONARY OF AMERICAN ENGLISH 1695 (William A. Craigie & James R. Hulbert eds., 1941) ("A system of government in which the government regulates the whole life of the nation."); 7 THE CENTURY DICTIONARY AND CYCLOPEDIA 4326 (1911) ("Paternal care or government; specifically, excessive governmental regulation of the private affairs and business methods of the people;

sion of the concept to additional contexts such as that of employment, is a more contemporary,[18] and increasingly derogatory, usage.[19]

Feminist theory's identification of paternalism as a tool of patriarchy explains this metamorphosis. Because paternalism involves a power relationship in which the more powerful decide for the less powerful, paternalistic policy-making stands suspect of controlling those whose moral and political right of self-determination it vacates,[20] frequently for the good of the policymakers themselves.[21]

Upholding paternalistic employment policies is not a new phenomenon in Supreme Court jurisprudence. More than a century ago, the Supreme Court proclaimed, infamously,[22] in

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undue solicitude on the part of the central government for the protection of the people and their interests, and interference therewith.").

[18] *See, e.g.*, THE NEW CENTURY DICTIONARY OF THE ENGLISH LANGUAGE 1260 (H.G. Emery & K.G. Brewster eds., 1944); WEBSTER'S NEW INTERNATIONAL DICTIONARY 1791 (William Allen Neilson et. al. eds., 1950).

[19] *See, e.g.*, THE DICTIONARY OF BIAS-FREE USAGE: A GUIDE TO NONDISCRIMINATORY LANGUAGE 211 (Rosalie Maggio ed., 1991) (noting that the term "is offensive to many women and minorities"); ALAN & THERESA VON ALTENDORF, ISMS: A COMPENDIUM OF CONCEPTS, DOCTRINES, TRAITS & BELIEFS 227 (1991) (stating that paternalism's prevalence contravenes "the most fundamental freedom of the right to guide your own life . . . without being perpetually scolded like a child").

[20] *See, e.g.*, MARILYN FRENCH, BEYOND POWER: ON WOMEN, MEN AND MORALS (1986); Martha L. Fineman, *Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship*, 42 FLA. L. REV. 25 (1990).

[21] *See* The Online Ethics Center, *at* http://www.onlineethics.org/glossary.html #anchP (last visited Mar. 6, 2006) (defining paternalism "as violating a moral rule of conduct toward someone or limiting that person's self-determination . . . for what is perceived as being [in] that person's own benefit").

[22] *See, e.g.*, Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lessons of* Lochner, 76 N.Y.U. L. REV. 1383, 1383 (2001) (rebuffing revisionist attempts at demonstrating the decision's legitimacy); David A. Strauss, *Why Was* Lochner *Wrong?*, 70 U. CHI. L. REV. 373, 373 (2003) (opining that *Lochner* "would probably win the prize . . . for the most widely reviled decision of the last hundred years"). *But see* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 128-29 (1985) (defending *Lochner* from a libertarian perspective); PAUL KENS, *LOCHNER V. NEW YORK*: ECONOMIC REGULATION ON TRIAL (1998) (analyzing the decision within the historical context of conflicting political ideologies and an incipient labor movement); David E. Bernstein, Lochner's *Legacy*, 82 TEX. L. REV. 1, 63-64 (2003).

Lochner v. New York[23] that the freedom to contract one's own labor was a central tenet of liberty in a free society.[24] That autonomous right, even when firmly grounded in the Equal Protection Clause[25] was, however, neither unlimited nor universal.[26] In a series of decisions following *Lochner*, the Court upheld various limitations on women's occupational freedom, all on the professed public policy ground of protecting women due to their frail constitutions. Three years after the *Lochner* Court generally recognized freedom of contract, the Justices held in *Muller v. Oregon*[27] that restricting the hours of women's employment was a valid exercise of the state's police power.[28] Without citing any evidence on the deleterious effects that working more than ten hours a day at a laundry would have, the Court stated that the restriction was warranted due to a "woman's physical structure and the performance of maternal functions" which "place her at a disadvantage" relative to man with whom "she is not an equal competitor."[29] Since "healthy mothers are essential to vigorous offspring," the Court reasoned that women's physical well-being was "an object of public interest and care."[30]

Similar restrictions on the hours women could work, the wages they could earn, and the occupations they could hold, were subsequently upheld in a number of other cases.[31] Each

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[23] 198 U.S. 45 (1905).

[24] *Id.* at 53 ("The general right to make a contract in relation to his business is part of the liberty of the individual protected" under the Constitution.).

[25] U.S. CONST. amend. XIV.

[26] The freedom to contract was certainly prevalent, however, because the *Lochner* era Court invalidated some two hundred regulatory measures. *See* Strauss, *supra* note 22, at 373.

[27] 208 U.S. 412 (1908).

[28] *Id.* at 422-23. The statute restricted the employment of any "female . . . in any mechanical establishment, or factory, or laundry for "more than ten hours" of any twenty-four hour cycle. *Id.* at 416 (quoting 1903 Or. Laws 148).

[29] *Id.* at 421-22.

[30] *Id.* at 421.

[31] In *Goesaert v. Cleary*, for instance, the Supreme Court upheld a Michigan statute requiring that bartenders be licensed but prohibiting the licensing of women as "barmaids," unless they were either the spouses or daughters of male liquor establishment owners. 335 U.S. 464 (1948), *overruled by* Craig v. Boren, 429 U.S.

of these decisions relied on the broadly accepted, but factually unsubstantiated ground that women were relatively frail compared to men.[32] As a result, the state had a legitimate interest both in protecting women's health, and by extension, the safety of members of the public who came into contact with them.[33] Hence, resting on apparently benign and paternalistic considerations, the Supreme Court endorsed the restriction of women's workplace opportunities based on their biological difference, without real evidence that this difference rendered them exceptionally vulnerable.[34]

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190 (1976). This was because only the "oversight" of a male with special interest in both the woman's welfare and the protection of bar room property, "assured through ownership of a bar by a barmaid's husband or father," could be trusted to "minimize[] hazards" otherwise confronting an unprotected barmaid. *Id.* at 466; *see Chill Wind*, *supra* note 13; Anita Silvers & Michael Ashley Stein, *Disability, Equal Protection, and the Supreme Court: Standing at the Crossroads of Progressive and Retrogressive Logic in Constitutional Classification*, 35 U. MICH. J. L. REF. 81, 88-89 (2002) [hereinafter *Standing at the Crossroads*].

[32] *See generally* Mary E. Becker, *From* Muller v. Oregon *to Fetal Vulnerability Policies*, 53 U. CHI. L. REV. 1219 (1986) (outlining sex-specific protectionist legislation); Judith Olans Brown et al., *The Mythogenesis of Gender: Judicial Images of Women in Paid and Unpaid Labor*, 6 UCLA WOMEN'S L.J. 457 (1996) (describing how traditional stereotypes about women have informed judicial decision-making); Laura Oren, *Protection, Patriarchy, and Capitalism: The Politics of Gender Specific Regulation in the Workplace*, 6 UCLA WOMEN'S L.J. 321 (1996) (comparing legislative limitations on women in the workplace in England during 1830-40 with those utilized in America from 1970-80).

[33] For example, in 1915 the Court upheld dual challenges to a California statute limiting the number of hours women could contract to work in *Miller v. Wilson,* 236 U.S. 373, 382 (1915) and in *Bosley v. McLaughlin,* 236 U.S. 385, 394-96 (1915). In the latter case, the Court reasoned that limiting the number of hours a woman could work as either a pharmacist or a student nurse was reasonable in light of "the extreme importance to the public that it should not be performed by those who are suffering from over-fatigue." *Id.* at 392.

[34] The analogy of a parallel social convention, between women and individuals with disabilities, because of perceived biological differences, is one that several of the authors have made previously as part of a continuing research agenda. *See Chill Wind*, *supra* note 13, at 221; *Standing at the Crossroads*, *supra* note 31.

II. THE TREND TOWARDS AUTONOMY—*UAW v. JOHNSON CONTROLS, INC.*

The framework for justifying women's exclusion from occupational opportunity on the basis of unfounded stereotypical assumptions was dramatically changed following passage of the Civil Rights Act of 1964.[35] As elegantly explained in *Weeks v. Southern Bell Telephone & Telegraph Co.*:[36] "Title VII rejects just this type of romantic paternalism as unduly Victorian and instead vests individual women with power to decide whether or not to take on unromantic tasks."[37] Consequently, previously held notions that automatically assigned women to certain occupational roles, and precluded their participation in others based on stereotypes of their bodily deficiency, were replaced by a standard which placed a heavy burden upon employers seeking their exclusion.[38]

The Court's developing jurisprudence on the standards necessary to exclude women from the workplace reached an apotheosis in 1991 with *UAW v. Johnson Controls*.[39] Defen-

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[35] Pub. L. No. 88-352, §§ 701-16, 78 Stat. 241, 253-66 (codified as amended at 42 U.S.C. §§ 2000e et seq. (2000)). Concurrent with the Court's recognition of women's right to autonomy in the workplace, was judicial acknowledgment that women were also entitled to make decisions about their own health and well-being. These rulings, whether based on constitutional, statutory, or common law principles, clearly rejected the notion that paternalism was a sufficient justification for intervening in personal decision making. This is particularly evident in women's reproductive rights cases, as well as in the general health care context. *See* Griswold v. Connecticut, 381 U.S. 479 (1965) (prohibiting state from interfering with individual's ability to use contraceptives); *see also* Cruzan v. Mo. Dep't of Health, 497 U.S. 261 (1990) (holding that surrogate decision maker could refuse lifesaving treatment on behalf of patient if there was clear and convincing evidence of patient's wishes); Roe v. Wade, 410 U.S. 959 (1973) (upholding woman's right to abortion); Eisenstadt v. Baird, 405 U.S. 438 (1972).

[36] 408 F.2d 228 (5th Cir. 1969).

[37] *Id.* at 236.

[38] *See, e.g.,* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 730 n.16 (1982) (observing that the sex-based differential treatment was merely a codification of empirically unsubstantiated social conventions); Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (holding as a general empirically verified proposition that one's sex was frequently unrelated "to ability to perform or contribute to society").

[39] 499 U.S. 187 (1991).

dant corporation was engaged in the manufacture of batteries, a central process of which exposed its workers to lead.[40] In 1982, Johnson Controls enacted a policy excluding all women "capable of bearing children," which it defined as every female employee "except those whose inability to bear children is medically documented," from any jobs which exposed them to lead.[41] Further, the policy defined an unacceptable work station as one below the critical level established by the Occupation Safety and Health Administration (OSHA) for safe reproduction by either sex.[42] A class action on behalf of "all past, present and future production and maintenance employees" was filed and successfully certified.[43]

At trial, the parties did not dispute that excessive lead exposure could result in "significant harm to persons."[44] They differed, however, on whether the lead exposure at the Johnson Controls plant actually endangered fetuses, and if so, whether this risk was confined only to women workers.[45] Each side proffered expert testimony, which also did not reach a consensus.[46] The district court granted summary judgment

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[40] *Id.* at 190.

[41] *Id.* at 192 (citation omitted). This policy departed from an earlier one in which fertile women wanting to work in jobs that brought them in proximity to lead were required to sign a statement indicating they had been apprised of the attendant risks. *Id.* at 191.

[42] *Id.* Specifically, thirty micrograms of lead per deciliter of blood or thirty micrograms of lead per cubic meter of air. *See id.* at 191-92 (citing 29 C.F.R. § 1910.1025 (1990)).

[43] *Id.* at 192 (citation omitted). The class composition, which included both men and women, was arrived at by stipulation. *Id.* Among the named class representatives were a woman who had chosen sterilization as a means of retaining her position, a post-menopausal divorcee who had been transferred from her position to a lower paying one where she would not be exposed to lead, and a male employee who had been denied a leave of absence in order to lower his lead level prior to fathering children. *See* UAW v. Johnson Controls, Inc., 680 F. Supp. 309 (E.D. Wis. 1988) [hereinafter *Johnson Controls District Court*], *aff'd* 886 F.2d 871 (7th Cir. 1989), *rev'd* 499 U.S. 187 (1991).

[44] *Johnson Controls District Court*, 680 F. Supp. at 310.

[45] *Id.*

[46] *Id.* at 315. Dr. Whortin testified on behalf of the class that the OSHA standard "should generally protect adults of either sex from significant adverse effects," but admitted that high exposure could endanger a fetus. *Id.* at 311 (cita-

for Johnson Controls, holding that although medical evidence on the effect of lead exposure on fetuses varied in relation to the level of exposure,[47] "concern for society and future generations" impelled it to uphold Johnson Controls' fetal protection policy.[48] Moreover, because "[t]here is a business necessity to protect fetuses,"[49] the court held that Johnson Controls had sufficiently carried its burden of proof to invoke the business necessity defense.[50] Consequently, the district court declined to undertake a Bona Fide Occupational Qualification (BFOQ) analysis.[51]

Sitting en banc,[52] the Court of Appeals for the Seventh Circuit affirmed the grant of summary judgment on three grounds.[53] First, the appellate court held that the business necessity defense (rather than BFOQ) was the proper one under which to evaluate defendant's fetal-protection policy.[54] In so ruling, it disagreed with the Fourth and the Eleventh Circuits, and created an inter-circuit conflict.[55] Applying that standard, it held that Johnson Controls was entitled to sum-

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tion omitted). For Johnson Controls, Drs. Scialli and Chisolm and Professor Legator each testified that as a general principal fetuses were in danger of developing abnormalities from lead exposure: Dr Fishburn avowed that overexposure to lead could damage fetuses, Dr. Silbergard gave evidence that high levels of lead exposure were known to cause spontaneous abortions, and Professor Brix testified on studies indicating that exposure to lead effected the reproductive tracts of male mammals. *Id.* at 310-12. None of the experts made any representations as to the level of exposure at the battery manufacturing plant and the risk that was thereby caused. *Id.* Finally, Dr. Scialli and Professor Hammon opined that blood levels below fifty micrograms per blood deciliter would not result in abnormalities to offspring *Id.* at 311.

[47] *Id.* at 315.

[48] *Id.* at 316.

[49] *Id.*

[50] *Id.* at 317.

[51] *Id.*

[52] As a result, the interim three judge panel decision was vitiated. *See generally* Michael Ashley Stein, *Uniformity in the Federal Courts: A Proposal for Increasing the Use of En Banc Appellate Review,* 54 U. PITT. L. REV. 805 (1993).

[53] UAW v. Johnson Controls, Inc., 886 F.2d 871, 901 (7th Cir. 1989) [hereinafter *Johnson Controls Seventh Circuit*], *rev'd* 499 U.S. 187 (1991).

[54] *Johnson Controls Seventh Circuit*, 886 F. 2d at 885.

[55] *See* Hayes v. Shelby Mem'l Hosp., 726 F.2d 1543 (11th Cir. 1984); Wright v. Olin Corp., 697 F.2d 1172 (4th Cir. 1982).

mary judgment.[56] This was because both parties agreed that there existed a substantial risk to fetuses.[57] The Seventh Circuit also dismissed the claims of the male employees, reasoning that the evidence presented on the risk resulting from their exposure was "at best, speculative and unconvincing."[58]

The Supreme Court reversed and remanded.[59] Writing for the Court, Justice Blackmun pointed out that Johnson Controls' bias was obvious for it allowed men the option of choosing whether to endanger their reproductive health, but did not afford women the same option.[60] The policy had also discriminated on the basis of sex by excluding women of childbearing age from lead-exposed jobs.[61] Moreover, the Seventh Circuit was incorrect in assuming (contrary to two other circuits), that Johnson Controls' fetal-protection policy was facially neutral, because it was applied differently for women than men.[62] First, the policy classified employees on the basis of their sex and childbearing capacities, rather than on their fertility.[63] Second, the defendant was concerned with the fate of children born only to its female employees.[64] Third, the policy was "facially discriminatory because it required only female employees to produce proof that they were incapable of reproducing."[65] Nor did "the absence of a malevolent motive" make the policy benign or any less disparate in its impact.[66]

In addition, the appellate court applied the wrong standard in assessing the validity of Johnson Controls'

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[56] *Johnson Controls Seventh Circuit*, 886 F.2d at 886. The court held that even if a BFOQ standard was applied, defendant would still be entitled to summary judgment. *Id.* at 888-89.

[57] *Id.* at 885.

[58] *Id.* at 889.

[59] UAW v. Johnson Controls, Inc., 499 U.S. 187, 211 (1991) [hereinafter *Johnson Controls*].

[60] *Id.* at 197.

[61] *Id.*

[62] *Id.* at 198.

[63] *Id.*

[64] *Id.* at 199.

[65] *Id.* at 198.

[66] *Id.* at 199.

exclusionary policy, for Title VII required a BFOQ, rather than business necessity, analysis in disparate treatment cases.[67] Under a BFOQ analysis, discrimination on the basis of sex because of safety concerns was only allowable in "narrow circumstances."[68] To pass judicial scrutiny, an employer had first to demonstrate that its policy was prompted by a "high correlation between sex and ability to perform job functions," one in which "sex or pregnancy actually interferes with the employee's ability to perform the job."[69] In the circumstance of battery manufacturing fertile women were clearly as functionally capable as infertile ones, for at trial Johnson Controls had failed to demonstrate any "factual basis for believing" otherwise.[70] Moreover, the "sparse record" established that the company was concerned with an unknown number but apparently "small minority of women."[71] What's more, for the eight pregnancies previously reported at the company, no evidence was given that any of the babies had had their health affected.[72]

Thus, rather than the permissible altruism of wanting to protect the health of unborn children, the Court reasoned that the exclusionary fetal-protection policy was driven by self-serving motivations, especially evading potential tort liability. Thus, the policy bore a hallmark of paternalism, namely, serving the policymakers' interest while purporting to protect the interests of those subordinated by the policy. Further, this motivation was not justifiable.[73] Allowing a defendant to evade an antidiscrimination law "by resorting to an exclusionary policy" would negate both the goal and the efficacy of those measures.[74] Nor could "the extra cost of employ-

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[67] *Id.* at 200.

[68] *Id.* at 202.

[69] *Id.* at 202, 204.

[70] *Id.* at 207.

[71] *Id.* at 206.

[72] *Id.* at 207. For an assessment of empirical studies relating to fetal exposure, see generally ROBERT H. BLANK, FETAL PROTECTION IN THE WORKPLACE: WOMEN'S RIGHTS, BUSINESS INTEREST, AND THE UNBORN (1993).

[73] *See Johnson Controls,* 499 U.S. at 208-10.

[74] *Id.* at 210.

ing" women constitute an affirmative defense under civil rights statues, for after considering the issue at length, Congress had decided to prohibit discrimination "despite the social costs associated therewith."[75]

Moreover, Justice Blackmun reasoned, in each of the few cases where this strict standard was met (including the Court's ruling in *Dothard v. Rawlinson*,[76] as well as a handful of circuit court opinions involving pregnancy exclusions),[77] the exclusion of women was justified only because of safety risks to third parties.[78] By contrast, "[t]he unconceived fetuses of Johnson Controls' female employees" were not "third parties whose safety is essential to the business of battery manufacturing."[79] Noting how women had historically been excluded from workplace opportunity under the guise of altruistic concern for their well-being,[80] the Court emphasized that it was the "individual woman's decision to weigh and accept the risks of employment."[81]

Thus, the ruling in *Johnson Controls* firmly established that to justify excluding women from workplace opportunities because of their sex, employers had first to prove such exclusions actually prevented women from harming third parties. When the potential hazards were to their own well-being, women retained the autonomy of choosing whether to undergo those risks unless employers could also demonstrate that the hazards interfered with job performance.[82]

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[75] *Id.*

[76] 433 U.S. 321 (1977).

[77] *Johnson Controls,* 499 U.S. at 202.

[78] *Id.*

[79] *Id.* at 203.

[80] *Id.* at 211; *see supra* notes 73-79 and accompanying text.

[81] *Johnson Controls*, 499 U.S. at 202 (citing *Dothard*, 433 U.S. at 335).

[82] *See generally* Mary Becker, *Reproductive Hazards after* Johnson Controls, 31 HOUS. L. REV. 43 (1994); Susan S. Grover, *The Employer's Fetal Injury Quandary After* Johnson Controls, 81 KY. L.J. 639 (1993) (analyzing an employer's dilemma when confronted with a conflict between state fetal tort law and federal antidiscrimination law).

III. AUTONOMY LIMITED—*CHEVRON U.S.A., INC V. ECHAZABAL*

Like women, people with disabilities have a history of being subjected to overprotective laws and workplace policies based on notions of biological incapability.[83] Congress recognized this, stating in the "Findings and Purposes" section of the ADA that individuals with disabilities continually encounter the discriminatory effects of "overprotective rules and policies,"[84] and have been faced with restrictions and limitations "based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society."[85] The first (and only) Rehnquist Court case to deal with the ADA and paternalism was *Chevron U.S.A., Inc. v. Echazabal.*[86]

In *Echazabal*, oil refinery worker Mario Echazabal was employed by independent contractors of Chevron from 1972 to 1996.[87] During that period he twice applied directly to Chevron for a job, a prerequisite of which was to pass a physical examination.[88] Both examinations revealed his liver to have abnormalities, eventually diagnosed as a Hepatitis C infection.[89] Each time, Chevron's doctors asserted that Echazabal's liver could be harmed through continued exposure to toxins at the refinery, and Chevron subsequently withdrew

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[83] *See, e.g.* ALAN GARTNER & TOM JOE, IMAGES OF THE DISABLED DISABLING IMAGES (1987) (demonstrating how the disabled are characterized as feeble or incapable, and are often objectified); PAUL LONGMORE, WHY I BURNED MY BOOK AND OTHER ESSAYS ON DISABILITY 1131-148 (2003) (describing images of pity that Hollywood and other mass media disseminate about people with disabilities); Feldblum, *supra* note 6, at 165 (asserting that the general public's view is that "disabled people lack value and are to be pitied").

[84] 42 U.S.C. § 12101(a)(5) (2000).

[85] *Id.* at § 12101(a)(7).

[86] 536 U.S. 73 (2002).

[87] *Id.* at 76.

[88] *Id.* This pre-condition to employment, required of all job applicants, is authorized under the ADA. 42 U.S.C. § 12112 (2000); *see generally* Chai R. Feldblum, *Medical Examinations and Inquiries Under the Americans With Disabilities Act: A View From the Inside*, 64 TEMP. L. REV. 521 (1991).

[89] *Echazabal*, 536 U.S. at 76.

its offer of employment.[90] After the second instance, Chevron directed the independent contractor employing Echazabal to either reassign him to a job where he would not be exposed to toxic chemicals or to make him redundant.[91] The contractor laid off Echazabal, who filed suit against Chevron in state court, alleging that the refusal to either hire him directly or retain him through the contractor constituted disability discrimination under the ADA.[92]

Chevron removed the suit to federal court and defended its action under an EEOC regulation interpreting the ADA's defense of employees engendering a "direct threat."[93] In pertinent part, the regulation stated that a direct threat involved "a significant risk of substantial harm to the health or safety of the individual or others," the determination of which "shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions" of their employment.[94]

At trial, expert medical witnesses disputed whether Echazabal was in fact exceptionally vulnerable to toxins at Chevron's plant.[95] Echazabal's doctors testified that Chevron's assertion about Echazabal's posing a risk to himself was unfounded,[96] and that working at the refinery placed

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[90] *Id.*

[91] *Id.*

[92] *Id.* at 76-77.

[93] *Id.* at 77; 42 U.S.C. § 12113(b) (2000).

[94] 29 C.F.R. § 1630.2(r) (2006). Under this regulation, this decision had to be based upon "reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence" and specified four factors to be considered: "(1) [t]he duration of the risk; (2) [t]he nature and severity of the potential harm; (3) [t]he likelihood that the potential harm will occur; and (4) [t]he imminence of the potential harm." *Id.*

[95] *Joint Appendix of Petitioner and Respondent to Chevron U.S.A., Inc. v. Echazabal* (on file with authors) (hereinafter *Joint Appendix*).

[96] Testifying on behalf of Echazabal, Drs. Fedoruk and Gitnick countered Chevron's assertion that he would pose a risk to himself as unfounded for three main reasons. *Id.* at 99-116. First, because as a matter of general pathology, chronic cases of Hepatitis C of the type with which Echazabal presented could take decades of exposure to toxins before impairing liver function. *Id.* at 101, 102, 112-114. Second, that Echazabal's albumin blood levels, "the best and only true

him at no greater risk than any other Chevron employees.[97] In opposition, Chevron presented expert medical testimony that Echazabal had "abnormal liver function tests" consistent with chronic Hepatitis C, as a result of which he had a "greatly decreased capacity to process toxins," and therefore ought not to be allowed to work in the refinery.[98] None of these witnesses, however, was confident that Echazabal would be harmed through continued employment.[99] Nevertheless, the district court granted summary judgment for Chevron, holding that no genuine issue of material fact had been raised as to whether the company had acted reasonably in relying upon its own doctor's assessments, regardless of their accuracy.[100]

On appeal to the Ninth Circuit, the court had the parties brief a question not previously raised, namely whether the EEOC regulation, which extended the definition of direct threat to encompass direct threats to one's own self, was permissible rulemaking under the ADA.[101] Holding that the EEOC had exceeded its authority, the Ninth Circuit reversed the grant of summary judgment.[102] As Title I specified threats only to "other individuals in the workplace," the Ninth Circuit reasoned that the defense could not be applied to dis-

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indicators of liver function," demonstrated that his "liver is functioning properly" so that "Echazabal is in no greater risk of injuring himself and specifically his lever [sic] by working in the refinery than other employee[s]." *Id.* at 113, 115. Third, that Chevron's own records indicated that none of the toxins alleged to endanger Echazabal were present at a level sufficient to endanger any of its refinery workers. *Id.* at 102-110

[97] *Id.* at 109.

[98] *Id.* at 41-44, 157-58, 172-73, 212 (testimony of Drs. Baily, McGill, Bridge, and Tang).

[99] For example, in cross-examination, Dr. Tang could not state with certainty that there was a higher than one percent chance of Echazabal being so injured, and that if such harm ensued, whether it would manifest in hours, months, or years. *Id.* at 83-88.

[100] *Order Granting Chevron's Motion for Summary Judgment in* Echazabal v. Chevron U.S.A., Inc. (Civil Action No. 97-CV-3498) (C.D. Cal. 1998) (hereinafter *Echazabal District Court*), reproduced in *Joint Appendix, supra* note 95, at 171.

[101] *See* Echazabal v. Chevron U.S.A., Inc., 226 F.3d 1063, 1066 n.3 (9th Cir. 2000) (hereinafter *Echazabal Ninth Circuit*).

[102] *Id.* at 1072. It also vacated part of the judgment, and remanded the case back to the district court for proceedings consistent with its opinion. *Id.* at 1073.

abled workers themselves.[103] Such an interpretation conflicted with the legislative history, which expressly rejected the use of paternalism as a means for excluding individuals with disabilities from the workplace.[104] It also diverged from the general policy, as demonstrated in *Johnson Controls*, of interpreting antidiscrimination provisions "to prohibit paternalistic employment" practices by allowing the protected individuals to choose for themselves whether to undertake risk.[105]

The Court of Appeals also rejected Chevron's argument that Echazabal was not "otherwise qualified" under the statute, ruling that an ability to perform the job without risking one's health was not an essential job function.[106] To hold otherwise would allow Chevron to include any functions it chose in the job description, and thereby render "meaningless" the term "essential functions."[107] Finally, the court noted that Chevron's apprehension about potential tort liability reflected a concern that hiring a worker with a disability would prove more costly than hiring one without a disability.[108] Even if that were true,[109] however, "[t]he extra cost of employing disabled individuals does not in itself provide an affirmative defense to a discriminatory refusal to hire those individu-

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[103] *Id.* at 1067.

[104] *Id.* at 1067-68. The court quoted at length the explanation given by Senator Kennedy, one of the ADA's co-sponsors:

> It is important, however, that the ADA specifically refers to health and safety threats to others. Under the ADA, employers may not deny a person an employment opportunity based on paternalistic concerns regarding the person's health. . . . that is a concern that should rightfully be dealt with by the individual, in consultation with his or her private physician.

Echazabal Ninth Circuit, 226 F.3d at 1067-68 (quoting 136 CONG. REC. S9684-03, at S9697 (1990)).

[105] *Id.* at 1068-69.

[106] *See id.* at 1070.

[107] *Id.* at 1071.

[108] *Id.* at 1070.

[109] This has never empirically been proven to be the case. In fact, existing studies indicate the opposite conclusion. Michael Ashley Stein, *The Law and Economics of Disability Accommodations*, 53 DUKE L.J. 79, 123-141 (2003).

als."[110] Because the Ninth Circuit's interpretation of the EEOC regulation was in direct conflict with that of the Eleventh Circuit[111] (and also opposed the understanding of the Seventh Circuit),[112] the Supreme Court granted certiorari.[113]

Writing for a unanimous Supreme Court which reversed and remanded the case to the Ninth Circuit, Justice Souter reasoned that the ADA's exclusions of job-related direct threats were "consistent with business necessity"[114] and created "spacious defensive categories" that left the EEOC "a good deal of discretion" for interpreting the statute.[115] Additionally, Congress did not explicitly exclude this interpretation, a significant omission in light of the EEOC's having previously interpreted the same provision under the Rehabilitation Act to include threats to self.[116] Further, Echazabal's argument failed because "there is no apparent stopping point" to its implications.[117] Accordingly, the EEOC's interpretation was a valid one under the doctrine enunciated in another action involving the defendant, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[118]

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[110] *Echazabal Ninth Circuit,* 226 F.3d at 1070.

[111] *See* Moses v. Am. Nonwovens, Inc., 97 F.3d 446, 447 (1996) (upholding the dismissal of an epileptic for fear that he would have a seizure and fall into rolling machinery).

[112] Koshinski v. Decatur Foundry, Inc., 177 F.3d 599, 603 (1999) (permitting, on grounds of self-hazard, the dismissal of plaintiff with a degenerative hand disease who worked in close proximity to heavy machinery).

[113] 534 U.S. 991 (2001). The Court did not list the questions upon which it granted certiorari. *Id.*

[114] 42 U.S.C. § 12113(a) (2000).

[115] *Echazabal*, 536 U.S. at 78.

[116] 29 U.S.C. § 794 (1974). We discuss other implications of socio-legal accretions from the Rehabilitation Act, in *Standing at the Crossroads, supra* note 31. *See also* Michael Ashley Stein, *Disability, Employment Policy, and the Supreme Court*, 55 STAN. L. REV. 607 (2002) (reviewing RUTH O'BRIEN, CRIPPLED JUSTICE: THE HISTORY OF MODERN DISABILITY POLICY IN THE WORKPLACE (2001)).

[117] *Echazabal*, 536 U.S. at 83. Thus, "[i]f Typhoid Mary had come under the ADA, would a meat packer have been defenseless if Mary had sued after being turned away?" *Id.* at 84.

[118] 467 U.S. 837 (1984) (articulating the standards for deference to agency guidelines in the face of unclear statutes).

The Court also reasoned that Chevron's motivations were reasonable: "it wishes to avoid time lost to sickness, excessive turnover from medical retirement or death, litigation under state tort law, and the risk of violating" administrative agency guidelines.[119] This motivation was especially pressing in regard to OSHA, which fulfills its mandate to assure all workers "safe and healthful working conditions"[120] by requiring employers to provide workplaces that are "free from recognized hazards that are causing or are likely to cause death or serious physical harm".[121] OSHA concerns placed Chevron "at loggerheads" with Echazabal's interpretation of the ADA,[122] so Chevron's decision to keep its workplace free of the kind of worker who could be harmed seemed reasonable.[123]

Thus, the Court in *Echazabal* held the ADA's direct threat defense applicable to workers when endangered by their own job performance. It also differentiated this exclusion of workers with disabilities from the prohibited form that had banned women in *Johnson Controls*.[124] The Court, however, declined to articulate under what burden employers ought to be placed to properly assert the affirmative defense. It also avoided the factual question of whether Mario Echazabal had actually endangered himself.

Unlike *Johnson Controls* where the Court directly addressed the paternalism issue,[125] it sidestepped it in

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[119] *Echazabal*, 536 U.S. at 84.

[120] *Id.* (citing 29 U.S.C. § 651(b) (2000)).

[121] *Id.* (citing 29 U.S.C. § 654(a)(1) (2000)).

[122] *Id.* at 85.

[123] In a pair of footnotes, the Court stated that it did not consider the issue of whether Echazabal was himself a qualified individual with a disability such that he could perform essential job functions. That question would only arise if the Ninth Circuit, on remand, concluded that Chevron's decision to exclude Echazabal "was not based on the sort of individualized medical enquiry required" under the ADA. *Id.* at 76 n.1. Similarly, the Court declined to "try to describe how acutely an employee must exhibit a disqualifying condition before an employer may exclude him from the class of the generally qualified." *Id.* at 87 n.6.

[124] *See id.* at 86 n.5.

[125] Broadly speaking, *Echazabal* can be criticized on several fronts. As a matter of statutory construction, the Court's holding is curious. The Court held that the text of the ADA was not clear on whether the direct threat provision could

Echazabal, claiming that:

> [T]he EEOC's resolution [cannot] be called unreasonable as allowing the kind of workplace paternalism the ADA was meant to outlaw. The ADA was trying to get at refusals to give an even break to classes of disabled people, while claiming to act for their own good in reliance on untested and pretextual stereotypes. This sort of sham protection is just what the regulation disallows, by demanding a particularized enquiry into the harms an employee would probably face.[126]

But the ADA was intended to do more than provide just an individualized inquiry.[127] Rather, the overreaching goal of this civil rights statute was to prevent discrimination against peo-

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refer to threat-to-self, because *expresio unius exclusion alterius* does not apply. *See Echazabal,* 536 U.S. at 76. The Court could easily have found otherwise by focusing on a different canon of statutory instruction. *See generally* KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 521-535 (1960). The text explicitly refers to "direct threat to others," 42 U.S.C. § 12113(b) (2000), and traditional tenets of statutory construction suggest that words should be afforded their plain and ordinary meaning. *See* American Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982); *see also* LLEWELLYN, at 535. The interpretation that the Court adopts renders entirely meaningless the phrase "'of other individuals.'" Kohnke v. Delta Airlines, Inc., 932 F. Supp. 1110, 1111-12 (N.D. Ill. 1996) (quoting Welsh v. Boy Scouts of Am., 993 F.2d 1267, 1272 (7th Cir.). The legislative history of the ADA refers to "direct threat" repeatedly, but never once suggests that provision applies to the disabled person herself. *See Echazabal Ninth Circuit*, 226 F.3d at 1066-67. The Court's opinion can also be criticized from an administrative law perspective. Under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), if Congress clearly expresses its intent on an issue, the Court must give effect to that intent, and a court will not defer to an agency's construction of the statute. *Id.* at 842-43. Here, there is a strong argument (supported by the legislative history) that the language of the statute is clear, and the EEOC regulation expanding the direct threat provision to one's self appears to run contrary to that intent. In other ADA cases, the Court had been perfectly willing to disregard EEOC regulations. *See Sutton*, 527 U.S. at 503-04; *see also* Rebecca Hanner White, *Deference and Disability Discrimination*, 99 MICH. L. REV. 532 (2000); Theodore W. Wern, Note, *Judicial Deference to EEOC Interpretations of the Civil Rights Act, the ADA, and the ADEA: Is the EEOC a Second Class Agency?*, 60 OHIO ST. L.J. 1533 (1999).

[126] Chevron U.S.A., Inc. v. Echazabal, 536 U.S. 73, 75 (2002).

[127] Even on this occasion, Echazabal's doctors gave a very different account of the risks inherent given his liver condition. *Echazabal Ninth Circuit*, 336 F.3d at 1032 (finding level of toxins present placed Echazabal at no greater risk of injury than other workers).

ple with disabilities. This aspiration included protection against workplace policies that impose employers' narrow ideas of their employees' good and thereby deprive competent disabled individuals of employment opportunities.[128]

That competent citizens should be free to determine and pursue their own good, as long as doing so does not place others in harm's way, is a keystone of liberal democracy.[129] For example, John Stuart Mill famously urged:

> There is no reason that all human existence should be constructed on some one or some small number of patterns. If a person possesses any tolerable amount of common sense and experience, his own mode of laying out his existence is the best, not because it is the best in itself, but because it is his own mode."[130]

Moreover, respect for an individual's decisions regarding his or her own health or well being has been a fundamental right recognized in American jurisprudence. To quote Justice Cardozo's seminal remark, "[E]very human being of adult years and sound mind has a right to determine what should be done with his own body."[131]

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[128] 42 U.S.C. § 12101(5) (2000).

[129] For a proposal about anti-paternalistic policy that extends to people with serious to severe intellectual disabilities, see Leslie Francis & Anita Silvers, Liberalism and Individually Scripted Theories of the Good: Meeting the Challenges of Dependent Agency (unpublished manuscript, on file with authors).

[130] JOHN STUART MILL, ON LIBERTY 64 (1891). Mill's commitment to pleasure as the good is in his book, *Utilitarianism*:

> the theory of life on which this theory of morality is grounded—namely, that pleasure, and freedom from pain, are the only things desirable as ends; and that all desirable things (which are as numerous in the utilitarian as in any other scheme) are desirable either for the pleasure inherent in themselves, or as means to the promotion of pleasure and the prevention of pain.

JOHN STUART MILL, UTILITARIANISM 8 (1895). The discussion continues with the argument that some pleasures are qualitatively superior to others: "It is quite compatible with the principle of utility to recognize the fact, that some kinds of pleasure are more desirable and more valuable than others. *Id.* at 9.

[131] Schloendorff v. Society of NY Hospital, 105 N.E. 92, 93 (NY 1914). *See* Peter H. Schuck, *Rethinking Informed Consent*, 103 YALE L.J. 899 (1994).

To understand how far the Court in *Echazabal* distanced disabled people beyond the scope of this core democratic principle, we may once more compare the circumstance of Mario Echazabal with that of the plaintiffs in *Johnson Controls,* this time to ask about the ways in which, although similarly situated, they were inappositely treated by the Court.

IV. Disability Terrors and the Retreat From Autonomy

At first, similarities in the situations of the *Johnson Controls* plaintiffs and Mario Echazabal stand out. At the time the decision to exclude them from working was made, each was biologically capable of doing the job despite having the potential to become not so. As the *Johnson Controls,* Court observed: "Fertile women, as far as appears in the record, participate in the manufacture of batteries as efficiently as anyone else."[132]

Similarly, Echazabal worked for a contractor at the Chevron refinery, in the atmosphere supposedly toxic to him, for more than twenty years with no discernible harm to himself or his productivity, including a half decade after the initial discovery of his infection.[133] There further seems to be no evidence related to his being Hepatitis C positive to prove that working would have been more damaging to Echazabal than taking Tylenol. The history of concern about Hepatitis C positive individuals being at risk from Tylenol is instructive here. Overdoses of Tylenol, or acetaminophen (the generic name), can cause liver damage, and on the basis of extrapolation from this fact, people who showed signs of Hepatitis C once were warned against taking acetaminophen. Subsequently, longitudinal studies of this group of subjects showed that even those who already have sustained liver damage do not appear to be at increased risk of further damage.[134]

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[132] *Johnson Controls*, 499 U.S. at 206.

[133] *See* Brief for the American Public Health Association, the American Association for the Study of Liver Disease, the Hepatitis C Action and Advocacy Coalition, the Hepatitis C Association, the Hepatitis C Outreach Project, and Lambda Legal Defense and Education Fund as Amici Curiae Supporting Respondent, *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73 (2002) (No. 00-1406), *available at* http://www.bazelon.org/publichealthbrief.html [hereinafter APHA Amicus Brief].

[134] *See* David H. Winston & Donna C. Winston, Management of Hepatitis

As noted in an *amicus* brief filed on behalf of Echazabal, hepatoxic chemicals such as those present at the Chevron refinery cause liver damage only if present in toxic amounts, in which case exposure threatens liver damage in all workers equally.[135] Here, another similarity to the *Johnson Controls*, plaintiffs is revealed. The *Johnson Controls* Court found that the exclusionary policy was not facially neutral because it did "not apply to male employees in the same way as it applies to females, despite evidence about the debilitating effect of lead exposure on the male reproductive system."[136] The medical evidence that refinery toxins are damaging to people who test negative and positive to Hepatitis C resembles the medical evidence that battery chemicals are damaging to male and female reproductive capabilities.[137] Yet in *Echazabal* the Court did not take notice of Chevron's decision to prohibit disabled workers from risking liver function for the opportunity of well-compensated refinery work while permitting nondisabled workers to take similar risks for access to this opportunity.

Despite the potential to focus on these similarities, the *Echazabal* Court turned to dissimilarities between the cases, namely, to the question of who besides the plaintiff stood to be harmed by his presence in the workplace. In *Johnson Controls* the others at risk were believed to be the unborn, but in *Echazabal*, the class consisted of present and future workers, including disabled workers.

Both sides stipulated in *Johnson Controls* that "there was a substantial risk to a fetus from lead exposure."[138] Therefore,

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BY THE PRIMARY CARE PROVIDER: MONITORING GUIDELINES 27, *available at* http://www.hcvadvocate.org/hepatitis/About_Hepatitis_pdf/1.1.2_Training_Resources/PCPP_GUIDELINES_final.pdf (last visited Mar. 29, 2006); *see also* Hepatitis C: Understanding the Liver, *available at* http://www.hepatitis.va.gov/vahep?page-tp03-01-01-90 (last visited Mar. 26, 2006).

[135] *See generally* APHA Amicus Brief, *supra* note 132.

[136] *Johnson Controls*, 499 U.S. at 188.

[137] *Compare Joint Appendix*, *supra* note 95, at 109 (asserting that working at refinery placed Echazabal at no greater risk than other workers), *with Johnson Controls District Court*, 680 F. Supp. at 310 (concluding that lead exposure could result in significant harm to males and females).

[138] *Johnson Controls*, 449 U.S. at 194.

fetuses were the potential recipients of harm, and the goal of the employer's policy was variously described as "preventing the health hazard to the fetus" or "protecting the unborn" and even as protecting "unconceived children."[139] Indeed, the Court took safeguarding the unconceived to be the company's main articulated justification for the policy. The Court did not understand risks to the unconceived to fall under the concept of risks to others, especially others essential to the business of battery-making.

The company was prevented from invoking any burden the possible limitations of a pregnant co-worker might pose for other employees by the terms of the 1978 Pregnancy Discrimination Act.[140] Nevertheless, the company might have referenced parenthood by constructing a harm-to-fellow workers defense and arguing the difficulties of raising children whose fetal development has been damaged by exposure to lead. The argument would be that these children would suffer from greater than normal illness, and less than normal capability, needing extensive services from family, medical and school systems. Frequent absences might be expected of mothers of such children, creating hardships for co-workers.

That neither the *Johnson Controls* Court nor the defendant in this case cited potential harm to co-workers, despite the possibility of such, differentiates *Johnson Controls* from *Echazabal*. The *Echazabal* Court endorsed Chevron's reasonable wish "to avoid time lost to sickness, [and] excessive turnover from medical retirement or death."[141] The Court reasoned that even if Echazabal agreed not to hold the refinery liable for any liver-related illness he might develop, such illness still would impose an employee absence and turn-over costs on the employer.[142] Yet, nothing in Echazabal's previous years of work performance, in the same job at the same site,

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[139] *Id.* at 194-95, 198; *see also Johnson Controls District Court*, 680 F. Supp. at 316.

[140] 42 U.S.C. § 2000e(k) (2000).

[141] *Echazabal*, 536 U.S. at 84.

[142] *Id.*

demonstrated unusual sick time use, nor was there evidence in his prior work performance that hiring him courted the other problems. Had his work record raised such questions, it is unlikely that Chevron would have extended two offers of regular employment to him.

From this perspective, then, the Court weighed the similar possibility of burdens to co-workers differently. The prospective harms the Court discounted in *Johnson Controls* are similarly speculative to the harms the Court took as dispositive in *Echazabal*. Yet the Justices treated permitting Echazabal to judge the risk of working at Chevron for himself as a great threat to other people.

There is another way that *Johnson Controls* and *Echazabal* are inapposite. In *Johnson Controls*, the majority dismissed the importance and possibility of tort liability in the BFOQ inquiry.[143] In *Echazabal*, however, the Court viewed fear of state tort suits as a reason Chevron's policy was reasonable and legitimate.[144] This demonstrates at least two ways that the Court views disability-based paternalism differently from that based on gender. First, as noted by Justice White in his concurrence, the majority's view in *Johnson Controls* seems to rest on the notion that women could waive tort liability on behalf of their unborn children.[145] Although, as a matter of tort law, Justice White shows this to be wrong,[146] assuming its correctness reveals that the Court believes parents can waive tort liability on behalf of their unborn children but competent individuals with disabilities, like Mario Echazabal, cannot do the same for themselves. Second, by making tort costs irrelevant in

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[143] *See Johnson Controls*, 499 U.S. at 208 ("If, under general tort principles, Title VII bans sex-specific fetal-protection policies, the employer fully informs the woman of the risk, and the employer has not acted negligently, the basis for holding an employer liable seems remote at best.").

[144] *See Chevron*, 536 U.S. at 84.

[145] *See Johnson Controls*, 299 U.S. at 213 (White, J., concurring).

[146] *Id.* ("[A]lthough warnings may preclude claims by injured *employees*, they will not preclude claims by injured children because the general rule is that parents cannot waive causes of action on behalf of their children, and the parents' negligence will not be imputed to the children.").

Johnson Controls but controlling in *Echazabal*, the Court gives credence to the idea that disability discrimination is acceptable for economic reasons, a phenomenon commentators have referred to as "rational discrimination."[147]

During the *Echazabal* argument, Justice Breyer illustrated another dimension of the reluctance to prohibit paternalistic treatment of people with disabilities. He asked whether allowing disabled people the autonomy to decide what risks to take would extend to known suicidal workers seeking the means to die in their workplace.[148] But nothing about Echazabal suggests that a rule protecting his autonomy as a competent citizen would have nearly so wide a scope. A pre-employment medical exam that uncovered suicidal illness in a prospective worker would indicate as well the individual's deficit of decisional capacity. Unlike Echazabal, a suicidal patient is a general threat to himself, at risk wherever he is and not just in a specific workplace. In virtue of being suicidal, such a patient does not have decisional capacity and therefore is not competent to exercise autonomy in assuming risks. There is no record that suggests the ADA could preclude courts from judging a suicidal individual to be incompetent and therefore not suited to assuming risks to himself. On examination, therefore, Echazabal's exercising his own autonomy, weighing risks to himself against benefits for himself in deciding whether to take the Chevron job, does not put suicidal or other incompetent people in harm's way.

Also during argument in *Echazabal*, Justice Kennedy worried about whether requiring employers to give disabled workers access to environments possibly harmful to them, but safe for species-typical persons, might sap hard-won protective attitudes.[149] Here again, Echazabal's exercising autonomy to pursue a benefit despite its risk is cast as prospectively harmful to disabled people generally. But the view that employers' concern

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[147] *See* Aviam Soifer, *Courting Anarchy*, 82 B.U. L. REV. 699, 711 (2002).

[148] Dahlia Lithwick, *Off With Her Scarf!*, SLATE, Feb. 27, 2002, *available at* http://www.slate.com/id/2062604 (last visited Mar. 23, 2006).

[149] *Id.*

about the safety of disabled people (or about safety in general) will be eroded unless disabled people are banned from taking risks seems to applaud the kind of workplace paternalism the ADA was meant to outlaw. The ADA was trying to get at refusals to give an even break to classes of disabled people, while claiming to act for their own good in reliance on untested and pretextual stereotypes.[150] Surely no even break is afforded when workers with disabilities who seek equal opportunity to work must abandon being autonomous simply to assuage employers' concern about their safety. Being concerned for employees' safety is the right thing for employers to do, both for nondisabled and disabled groups, but deprivation of autonomy, and the concomitant ability to seek one's own good as one sees it, seems a high price to extract from just the latter group to induce employers to do the right thing.

CONCLUSION

The Rehnquist Court has taken the lead amongst the federal courts in treating disability discrimination claims as being of a fundamentally different stripe than those on the basis of race or gender. Nowhere is this more apparent than in the case of paternalism, which is expressly disallowed for gender but allowed for disability. As a result of this case, the employer was permitted to decide whether Mario Echazabal could risk working near toxic chemicals for the sake of an excellent income and benefits.

Mario Echazabal, a person who met the legal standard of decisional capacity but who had a disability, was not permitted to decide his own good. After losing his job at the Chevron refinery in 1996, Echazabal finally found part-time work in late 1998 as a school bus driver. His beginning pay was $7.00 an hour without benefits. His contracted job at the refinery paid an average of $11.50 with overtime and benefits, and the position to which he aspired, being employed by Chevron itself,

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[150] *See supra* note 104 and accompanying text (Ninth Circuit discussing the legislative history of the ADA).

would have averaged $17.29 an hour plus overtime and benefits.[151]

The Court compromised Echazabal's freedom to decide risks and benefits for himself, which is the very essence of being free. That the Court denied this was a case about paternalism,[152] combined with the fact that this was a unanimous decision, portends ill for the disability antidiscrimination project. The Court's failure to recognize the lines it is drawing and the effects of its decisions will be particularly harmful to workers with disabilities. Not recognizing paternalistic employment policies as discriminatory when disabled workers alone are subjected to them encourages stereotyping disabled people as incompetent, incapable of deciding their good for themselves, and embeds the idea that they are inauthentic workers.[153] Encouraging such policies also invites the adoption of exclusionary workplace norms.[154] This is a far cry from what Congress clearly hoped the ADA would accomplish.

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[151] Peter Blanck, NCD Policy Brief Series: Righting the ADA—No. 9, *Chevron v. Echazabal*: The ADA's "Direct Threat to Self" Defense, *available at* http://www.ncd.gov/newsroom/publications/2003/directthreat.htm (last visited Feb. 23, 2006). From that point on, the story becomes even more tragic. *See* Peter Blanck, *Justice for All? Stories About the Americans with Disabilities and Their Civil Rights*, 8 J. GENDER RACE & JUST., 1, 14 (2004) ("For Mario, the litigation was upsetting and unsettling. He was deprived of employment in his chosen trade, a trade he performed successfully for more than twenty years, because of unfounded fears about his health and potential liability. Mario passed away in January 2004.").

[152] *See Echazabal*, 536 U.S. at 75.

[153] *See generally* Stein, *supra* note 8.

[154] *See* Michael Ashley Stein & Michael E. Waterstone, *Disability, Disparate Impact, and Class Actions*, 56 DUKE L.J. ___ (forthcoming 2006) (manuscript on file with authors).

A MILITARY-CIVILIAN COALITION FOR DISABILITY RIGHTS

Ann Hubbard[*]

War—all war—is disabling.[1] It is designed to be.[2] The present war in Iraq is no exception. By some estimates, more than 100,000 Iraqi civilians have been killed and more than 42,000 injured.[3] Members of U.S. forces are being injured at a record rate.[4] Among service members who have returned from

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[1] Kay Schriner, *War in Iraq Arouses Disability Rights Advocates*, DISABILITY WORLD, Issue 17 (Jan.-Mar. 2003), *available at* www.disabilityworld.org/01-0_03/news/war.shtml (quoting statement by Disabled Peoples International that war injures, maims, creates disability, ends life, "sear[s] human memory with permanent scars of personal tragedy, and shatter[s] the dreams and hopes of children").

[2] Ann Darnbrough, *Fighting for the Rights of the 'Heroes,'* HEALTHMATTERS MAG., Issue 8, Autumn 1991, *available at* www.healthmatters.org.uk/issue8/ightsofheroes (stating that "in modern conflict, creating disability is all part of the strategy" and that aggression "rank[s] alongside poverty and natural disasters as the most important cause of disability").

[3] Les Roberts et al., *Mortality Before and After the 2003 Invasion of Iraq: Cluster Sample Survey*, 364 The Lancet 1857 (2004), *available at* www.thelancet.com/journals/lancet/article/PIIS0140673604174412. These figures are contested, but there is little reliable or authoritative information about Iraqi civilian casualties. *Military Estimates Iraqi Toll from Insurgency*, Reuters New Agency, Oct. 30, 2005 (reporting that the Pentagon refuses to release data on the number of Iraqi civilians killed or wounded by U.S. forces). Moreover, these statistics reflect only obvious physical injuries. War also breeds illnesses, physical and mental, that develop and progress over time. *See also* Julie Mertus, *Improving the Status of Women in the Wake of War: Overcoming Structural Obstacles*, 41 COLUM. J. TRANSNAT'L L. 541, 544 (2003) (citing increase in reported incidents of domestic violence in post-war Kosovo, reflecting "a widespread culture of violence and a general backlash against women").

[4] Ronald J. Glasser, *A War of Disabilities: Iraq's Hidden Costs Are Coming Home*, HARPER'S BAZAAR, vol. 311, no. 1862 (July 1, 2005), at 59, 2005 WLNR

Iraq, the incidence of amputations and multiple wounds is striking,[5] and stress- and trauma-related psychological disorders threaten to disrupt the lives of tens of thousands of veterans and their families. As veterans come home and make the transition to civilian life, some of their toughest obstacles could be society's physical and attitudinal barriers to people with physical or mental impairments. The injury or illness itself may be less disabling than the inaccessible public and private spaces and the fears, prejudices and closed minds they encounter.

Fifteen years after Congress passed the Americans with Disabilities Act of 1990, this new wave of service-related disabilities presents yet another reason and another occasion to reassess and reinvigorate efforts to achieve the ADA's aspirations. The Act promised equal opportunity and full participation for people with disabilities in all aspects of modern American life,[6] but progress toward those goals has been slow in some areas[7] and directly impeded in others.[8] Disability rights

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11817885 (reporting that eight troops have been wounded for every one killed, roughly double the rate in Korea, Vietnam, and the Gulf War).

[5] Denise Grady, *Struggling Back From War's Once-Deadly Wounds*, N.Y TIMES, Jan. 22, 2006, http://www.nytimes.com/2006/01/22/national/22wounded.html?ei=5094&en=d3126b7b679246b4&hp=&ex=1137992400 (stating that men and women with "multiple devastating injuries" are "the new face of the wounded, a singular legacy of the war in Iraq" and prompted the establishment of "polytrauma rehabilitation centers"); *id.* (reporting 345 veterans with amputations, including 59 who had lost more than one limb); Niraj Warikoo, *Amputee's Fighting Spirit: Faster, Smarter Battleground Care Saves More U.S. War Wounded*, DET. FREE PRESS, June 4, 2005, 2005 WLNR 8865303 (reporting that six percent of injured troops from Iraq have amputations, double the rate in previous wars).

[6] 42 U.S.C. § 12101 (1990).

[7] Michael Waterstone, *The Untold Story of the Rest of the Americans with Disabilities Act*, 58 VAND. L. REV. 1807, 1874 (2005) (presenting empirical evidence and analysis of the relative but still limited success of ADA claims under its public entity and private accommodations titles); Ruth Colker, *ADA Title III: A Fragile Compromise*, 21 BERKELEY J. EMP. & LAB. L. 377 (2000) (discussing the trend of underenforcement of ADA's public accommodations provisions).

[8] The tenth anniversary of the ADA prompted analyses of how a law with such ambitious aspirations and overwhelming bipartisan congressional support could fall prey to judicial skepticism and hostility. *See, e.g.*, Linda Hamilton Krieger, *Afterword: Socio-Legal Backlash*, 21 BERKELEY J. EMP. & LAB. L. 476, 488-89 (2000) (contending that because the disability rights movement of the

advocates are undeterred, but they could use reinforcements to regain momentum and support. Veterans are their natural allies.

Veterans with disabilities face struggles and challenges now familiar to nonveterans with disabilities.[9] For many returning veterans, simply picking up the strands of their previous lives or livelihoods is not an option. Their workplaces may not be accessible; they may no longer have the strength, dexterity or stamina to perform their prior jobs; or their former employers may be unwilling or unable to make the accommodations that would allow them to work—or even give them the chance to prove their mettle. They may also find that their churches, family dinner spots, movie theaters and gyms and their children's' preschools or playgrounds are inhospitable, if not downright inaccessible. Friends and total strangers respond differently to them; for the first time in their lives, they experience pity, aversion, avoidance or exaggerated admiration for the "courage" they show in going about in public in "their condition."

What's more, to a greater extent than ever, disabled soldiers are coming home not to their military bases or to an intact "band of brothers." Instead, the many members of the National Guard and the Reserves are returning home to their civilian communities, where few if any relatives, friends or neighbors can comprehend their experiences or fathom the

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1970s and 1980s never became part of popular consciousness as had the earlier civil rights movement, the ADA was not "supported by a broad-based popular understanding of the injustices faced by people with disabilities, the nature of their continuing struggle for inclusion and equality, or the particular theory of equality that informed the statutes' many ambiguous provisions"); *see also* Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19, 31-37 (2000); Wendy E. Parmet, *Plain Meaning and Mitigating Measures: Judicial Interpretations of the Meaning of Disability*, 21 BERKELEY J. EMP. & LAB. L. 53, 55-61 (2000); Richard K. Scotch, *Models of Disability and the Americans with Disabilities Act*, 21 BERKELEY J. EMP. & LAB. L. 213, 213-17 (2000).

[9] For simplicity, I refer to people who have not served in the military as "nonveterans" or "civilians," although I recognize that veterans, too, are civilians. Similarly, I refer to people who have returned from deployment in Iraq as "veterans," whether or not they have separated from the armed forces.

terrors they faced on the battlefield and continue to face at home. Like others who live with a disability in a world designed for the non-disabled, they have adjustments to make, rights to assert, and a new, unchosen identity to resist, assume or embrace. Know it or not, and like it or not, they have become members of a new community, the community of persons with disabilities. They have much to gain from and much to offer this community.

The fact that veterans and civilians participate in different health care and disability benefits programs (through the Department of Veterans Affairs (VA) or the Social Security Administration (SSA)) has, to some extent, obscured the extent to which their interests, their status and their fates are connected. Since the Civil War, civilian and veteran disability policies have developed in tandem. At times, veterans have been in the vanguard of shaping public understandings of and responses to disability. Disability policy for veterans has "reconceived the relationship between people, their bodily and mental capacities, and the physical and social environment," spawning ideas that "became an archtype of twentieth-century social policy."[10] The reverse also is true: broader social goals and public understandings of and attitudes toward disabilities have informed and animated advances in veterans' policy.

Moreover, a veteran's relationship with Veterans Affairs, however important it may be, is only the starting point for his or her transition or return to civilian life. An overarching goal of the VA is to rehabilitate, train and equip veterans to perform meaningful work and to go about their daily lives in their communities. Those workplaces and communities, however, still maintain barriers to people with disabilities, even those who wore a uniform. It is the disability community that is leading the fight for the removal of these barriers.

Thus, fifteen years after Congress adopted the ADA, this

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[10] K. Walter Hickel, *Medicine, Bureaucracy, and Social Welfare: The Politics of Disability Compensation for American Veterans of World War I*, THE NEW DISABILITY HISTORY: AMERICAN PERSPECTIVES 228, 236 (Paul K. Longmore & Lauri Umansky eds., 2001) [hereinafter Hickel, *Veterans of World War I*].

is an auspicious moment to consider how disability rights advocates and disabled veterans, two distinct but overlapping groups, can support and complement each other. Together, they might stimulate new public awareness and political support for making workplaces, stores, sports arenas and other public and private places more welcoming and accessible. To that end, Part I of this article quickly traces the development of disability policies in this country, and Part II draws from history and from present circumstances to identify some of the benefits of a synergistic relationship between seasoned disability rights activists and newly disabled veterans. I conclude that, by joining forces, they could form a powerful force for the recognition, enforcement and advancement of disability rights.

I. A History of Mutually Reinforcing Disability Policies

Throughout our nation's history, civilian and veteran disability policies have borrowed from each other and from the concerns of their times. At times, evolving societal and political understandings of disability have informed and shaped disability programs targeted to veterans. At other times, policies originally adopted for veterans have migrated to the general population of people with disabilities. Even a cursory look at the interaction between the parallel policies illustrates the potential benefits of increased collaboration between the two groups.

A. The Civil War: The Nation's First Large-Scale Pension Program

Advocacy by and on behalf of disabled veterans of the Union Army following the Civil War is, in large part, the genesis of the contemporary struggle of people with disabilities for social and economic recognition.[11] Union veterans and their advocates initiated a large-scale pension scheme that became

[11] Peter Blanck & Chen Song, *Civil War Pension Attorneys and Disability Politics*, 35 U. Mich. J.L. Reform 137, 143 (2002).

the model for subsequent disability and income support programs. They commanded an unprecedented and highly effective combination of grassroots advocacy, organized interest group lobbying, and partisan political appeals that now has become commonplace. And through their advocacy, they contributed to broad social and political understandings of what it means to be "disabled"—a question that continues to spark controversy today.[12]

From its inception as a modest compensation scheme for service-related disabilities, the pension program for Union veterans grew steadily over thirty years to become "the most costly and liberal pension scheme in the world."[13] Veterans spurred this growth through both individual and collective advocacy. In making their personal claims for disability benefits, individual veterans went beyond the prevailing "medical model" of disability, built on diagnoses and prognoses, to articulate a version of the "social model" of disability that is embraced in the ADA. The veterans' "social conception of disability . . . firmly placed disabled people in the social context of their relationships and needs," emphasizing not merely individual function or impairment, but also "the structure of local labor markets, job requirements, racial segregation, and social norms ascribing to men their roles as workers, providers and citizens."[14] This understanding contributed to the important "shift in the [public] perception of disability from personal fate to social contingency."[15] Professor Peter Blanck offers this insight into the social and political significance of the individual veterans' advocacy:

> No less than the Pension Bureau's doctors, veterans themselves played a role in articulating the meaning of disability

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[12] *See id.* at 140-41 (examining ways in which attitudes and stigma about disability and disability advocacy were introduced into American public consciousness after the Civil War).

[13] Peter David Blanck & Michael Millender, *Before Disability Civil Rights: Civil War Pensions and the Politics of Disability in America,* 52 ALA. L. REV. 1, 9 (2000).

[14] Hickel, *Veterans of World War I, supra* note 10, at 237.

[15] *Id.* at 241.

> in late nineteenth-century America. ... [A]pplicants were not passive objects of the labeling and stigmatizing processes embedded within Bureau practices. To the contrary, veterans aggressively exploited the Bureau's adversarial procedures. . . . Disabled veterans' experiences in securing pensions are reminders that efforts to negotiate bureaucratic structures and turn them to personal advantage, no less than more overt forms of advocacy, contestation and resistance, are political acts by which the members of marginalized groups subtly transform the institutions that impinge upon their lives—or at the very least, secure small victories that bring greater autonomy to the individual.[16]

Even as individual soldiers and their advocates were shaping disability evaluations from local doctors, the veterans' national organization, the Grand Army of the Republic, grew into "a formidable political machine whose activities kept the veterans' wartime sacrifices in the public consciousness and whose lobbying efforts played an important role in the pension system's expansion."[17] This advocacy model, which maintained "an ongoing relationship between the federal government, individual veterans, and the veterans' organizations that represented their interests," was until then unknown.[18] It was so successful, however, that it sparked a political backlash, a reaction that would later recur after other disability successes.

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[16] Blanck & Millender, *supra* note 13, at 14.

[17] *Id.* at 12.

[18] *Id.*; *see id.* at 12-13 (suggesting that "the repeated clashes between the Union veterans' advocates and their critics were a harbinger of the 'interest group pluralism' that was to characterize American political culture for much of the twentieth century") (citing THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES 120 (1992)); Blanck & Millender, *supra* note 13, at 10 (citing RICHARD FRANKLIN BENSEL, SECTIONALISM AND AMERICAN POLITICAL DEVELOPMENT 1880-1980, 63-64 (1984) ("Although such alliances are commonplace today, they were a novelty in the late nineteenth century.")).

B. World Wars I and II: Emphasis on Rehabilitation

World War I left 200,000 U.S. veterans with disabilities.[19] These service-related injuries coincided with an explosion of workplace injuries in an increasingly industrial economy. A growing political and public consensus supported rehabilitation programs for people injured in industrial accidents, and rehabilitation similarly appealed to politicians and VA administrators who were chastened by the runaway Civil War pensions and wary of generous long-term benefits for this latest influx of veterans. Using an array of rehabilitation programs in the states as models,[20] Congress enacted the Smith-Sears Veterans' Rehabilitation Act of 1918, the first federal law mandating rehabilitation for people with disabilities.[21] Only two years later, Congress created a similar federal rehabilitation program for civilians.[22] Once again, veterans were at the forefront of a major development in national disability policy. This time, although the nation's sense of debt to veterans played a role,[23] the underlying force was evolving social attitudes about

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[19] David A. Gerber, *Disabled Veterans and Public Welfare Policy: Comparative and Transnational Perspectives on Western States in the Twentieth Century*, 11 TRANSNAT'L L. & CONTEMP. PROBS. 77, 87 (2001).

[20] Vocational Rehabilitation Act, ch. 107, 40 Stat. 617, 617 (1918) (amended 1919) (identifying its purpose "to provide for vocational rehabilitation and return to civil employment of disabled persons discharged from the military or naval forces"). At this point, the states had established their own rehabilitation programs, but they had limited aims. Most programs were run by charitable organizations, and often they were couched as largesse for the "poor cripples." Consistent with that attitude, the training was largely vocational rehabilitation, which emphasized preparation for low-skill work. *See* Jonathan Drimmer, *Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities*, 40 U.C.L.A. L. REV. 1341 (1993).

[21] Gerber, *Disabled Veterans, supra* note 19, at 87-90.

[22] Smith-Fess Act, Act of June 2, 1920, ch. 219, 41 Stat. 735 (1920) (codified as amended at 29 U.S.C. §§ 731-741 (repealed 1973, and reenacted in the Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355)); *id.* at 735 (stating its purpose "to provide for the promotion of vocational rehabilitation of persons disabled in industry or in any legitimate occupation and their return to civilian employment"); *see* RICHARD K. SCOTCH, FROM GOOD WILL TO CIVIL RIGHTS: TRANSFORMING FEDERAL DISABILITY POLICY 20 (1984) (discussing veterans' rehabilitation program as model for civilian counterpart).

[23] Gerber, *Disabled Veterans, supra* note 19, at 91 (acknowledging that "the

disability:

> The impulse to assist in the restoration of these impaired veterans was determined by forces outside the experience of the war because it was lodged in the heart of new understandings of work and citizens as societal resources. This understanding had great significance for changing understandings of disability and the destinies of people with disabilities.[24]

Society's evolving beliefs and commitments about government's role in an increasingly industrialized nation also worked to the advantage of veterans of World War II. In a climate of growing acceptance of an expanding welfare state, policymakers modified or designed veterans' programs in part to reflect the welfarist conviction that it is the government's responsibility to "oversee the process of providing the opportunities for normalizing the existence of disabled veterans and to fund the major initiatives involved."[25] But how to do this effectively and humanely, yet affordably? The VA again focused on short- and medium-term support. As historian David Gerber explains, the government "became heavily involved in subsidizing post-service medical care, comprehensive vocational rehabilitation and general education, a wide-range of practical assistive technologies . . . and adapted environments, such as homes designed for wheelchair users."[26] In this endeavor, veterans benefitted from methods and devices developed for, and adapted and tested by, the general population of people with disabilities, as well as from innovations by VA rehabilitation specialists.

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debt owed to these soldiers for their sacrifices greatly influenced significant efforts on their behalf").

[24] *Id.*

[25] *Id.* at 104.

[26] *Id.*

C. *Vietnam War: The Recognition of Disabling Chronic Illnesses*

The young men who volunteered or were drafted into the Vietnam War and who acquired service-related disabilities did not come home to a hero's welcome—or even to a generous and grateful nation. To the contrary, they often faced hostility from fellow citizens and indifference from the government. Nonetheless, the aftermath of the war—and even the opposition to it—did contribute to disability awareness and activism. The widespread anti-war protests "helped to legitimate social activism," and the "large number of disabled veterans who were activists" provided models for disability rights activism.[27]

On a more specific level, the Vietnam veterans educated the VA, the medical profession and the public about war's enduring effects on those who fight it.[28] They experienced, recognized and legitimated the link between wartime experiences and otherwise unexplained chronic illnesses, increased incidence of recognized diseases, and refractory psychological problems.[29] Perhaps most significantly, they sparked new recognition of a disorder that goes hand-in-hand with war: post-traumatic stress disorder, or PTSD.[30] Post-war (and especially

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[27] SCOTCH, FROM GOOD WILL TO CIVIL RIGHTS, *supra* note 22, at 7.

[28] *See, e.g.*, Julia Whealin et al., *The Role of Military Studies in Enhancing Our Understanding of PTSD*, PTSD RESEARCH QUARTERLY, vol. 12, no. 1 (Winter 2001) (observing that "much of our research on PTSD has been conducted on war veterans" and that "[m]ilitary studies have made contributions to knowledge in this area that can be applied to non-military populations as well").

[29] Persistent and effective Vietnam veterans also led the VA to recognize service-related syndromes and illnesses caused by exposure to harmful chemicals. *See e.g*, DEPT. OF VETERANS AFFAIRS, AGENT ORANGE OVERVIEW, http://www1.va.gov/agentorange/ (describing VA's programs and policies related to health concerns linked to exposure to Agent Orange, an herbicide believed to cause diabetes, certain cancers, and other health problems).

[30] Stephen J. Cozza, *Combat Exposure and PTSD*, PTSD RESEARCH QUARTERLY, vol. 16, no. 1 (Winter 2005) ("Interest in postcombat clinical syndromes is relatively recent and resulted largely from the recognition of postwar emotional problems in Vietnam veterans."); Stephen L. Roberts, *Hidden Toll of the War In Iraq: Mental Health and the Military* (Center for American Progress, Sept. 14, 2004), *available at* http://www.americanprogress.org/site/apps/nl/content3.asp?c=biJRJ8OVF&b=681083&ct=214951 (citing studies showing that between 26

post-combat) symptoms of anxiety, stress and trauma were not a new phenomenon,[31] but their prevalence among Vietnam veterans, along with an evolving medical understanding of trauma, led the VA to take the disorder seriously, to conduct significant research on it, and to attempt to detect or forestall it in veterans of the Middle East wars.[32] The high rate of PTSD also called attention to the singular stresses of fighting a war without front lines or readily identifiable enemies—and foretold the nature and extent of psychological harm Iraq veterans were to experience.[33]

D. The Gulf Wars: Environmental Exposure and Chronic Illness

The Gulf Wars[34] reprise aspects of the Vietnam War. The first Gulf War exposed service members to noxious chemical and biological substances, which produced a range of medical conditions collectively known as Gulf War Syndrome.[35] Medical experts who ultimately validated the existence and service-relatedness of Gulf War Syndrome benefitted from studies of

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and 31 percent of Vietnam veterans have experienced war-related PTSD).

[31] Since the Civil War, veterans have come home with "nervous disorders," "combat fatigue," "shell shock," or simply "stress." *See* Carla K. Johnson, *Study: Combat Trauma Seen in Civil War*, ASSOC. PRESS, Feb. 6, 2006, *available at* http://www.usatoday.com/tech/science/discoveries/2006-02-06-civil-war-ptsd_x.htm?csp=34 (reporting on recently published study concluding, based on examination of Civil War medical records, that Union Army veterans experienced PTSD); Stephen J. Cozza, *Combat Exposure and PTSD*, PTSD RESEARCH QUARTERLY, vol. 16, no. 1 (Winter 2005) (citing research concluding that "postwar syndromes have been universally present in all modern wars").

[32] *See* Interview with Veterans Affairs Secretary R. James Nicholson, WASH. POST, Oct. 5, 2005, at A21; William M. Welch, *Trauma of Iraq War Haunting Thousands Returning Home*, USA TODAY, (Feb. 28, 2005).

[33] *See supra* notes 83-92 and accompanying text.

[34] The "Gulf Wars" refers to the brief 1991 invasion of Iraq (Operations Desert Shield and Desert Storm) and the ongoing war that began in March 2003 (Operation Iraqi Freedom). These conflicts also are referred to as the Gulf War and the Iraq War or Gulf War I and Gulf War II.

[35] Symptoms include fatigue, joint and muscle pain, headache, memory loss, depression, anxiety, respiratory problems and diarrhea. INSTITUTE OF MEDICINE, GULF WAR VETERANS: TREATING SYMPTOMS AND SYNDROMES 5 (Bernard Rosef & Lyla M. Hernandez eds., 2001) [hereinafter GULF WAR VETERANS].

Vietnam veterans and Agent Orange and from the advocacy of civilian disability activists who had obtained growing recognition of the existence and seriousness of other conditions of unknown etiology. Among those conditions that resemble Gulf War Syndrome are fibromyalgia, chronic fatigue syndrome, migraines, irritable bowel syndrome and depression.[36]

The current Gulf War, or Iraq War, resembles Vietnam in a different respect: It is a protracted struggle, waged against an enemy who could be anywhere or anyone, in a war zone seeded with makeshift explosives, and with soldiers living in relentless danger under harsh conditions. Like Vietnam, the Iraq War already has produced thousands of veterans with PTSD, anxiety or other neuropsychiatric disorders. Unlike Vietnam—and perhaps due to the aftermath of Vietnam—trauma-related mental or emotional disorders are better understood and, at least in some circles, less stigmatized.[37]

II. Applying History's Lessons to Build a Civilian-Military Coalition for Disability Rights

As we have just seen, throughout our nation's history, veterans and civilian disability rights advocates alike have contributed to advances in medicine and disability policy and informed our collective understanding of disability. The mutually reinforcing development of parallel military and civilian disability policies suggests that a more intentional collaboration could help create a more inclusive society, to the benefit of all persons with disabilities. To encourage this cooperation, I suggest several ways in which veterans and disability rights advocates can draw strength from each other.

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[36] *Id.* at 51-122. Indeed, when the VA sought effective treatment for Gulf War symptoms that did not correspond to readily identifiable medical conditions, it looked to treatment protocols for these other often elusive illnesses. *Id.*

[37] For a discussion of the incidence and treatment of mental disorders among service members returning from Iraq, see *supra*, notes 28-31 and accompanying text.

A. Veterans can gain greater understanding of disability as a social construction and realize that many limitations result from attitudinal and structural barriers and not from their impairment.

War is a powerful defining event. Although disabled veterans at times have been a catalyst for innovative disability policy, many of them identify more with other veterans, with whom they share formative wartime experiences, than with disabled civilians, with whom they share day-to-day peacetime experiences. Moreover, whenever a person acquires a disability as an adult, it alters how the world sees her and some aspects of how she sees herself. Newly disabled people arrive at different times—if at all—at constructing an individual identity as a person with a disability; recognizing the collective identity of people with disparate impairments and needs requires another move.[38] People who do find their way to the disability movement often discover that the affiliation is enlightening and empowering.

The disability movement enlightens by challenging the attribution of "disability" to a defect or incapacity inherent in the individual—the so-called "medical model" of disability.[39] Instead, disability activists locate "disability" at the interaction of an individual's physical or mental characteristics and an unwelcoming or inaccessible physical or social environment.[40]

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[38] For accounts of forming a disability identity, see SIMI LINTON, CLAIMING DISABILITY: KNOWLEDGE AND IDENTITY (1998); SUSAN WENDELL, THE REJECTED BODY: FEMINIST PHILOSOPHICAL REFLECTIONS ON DISABILITY (1996); ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 32-36 (1963). The collective identity of "people with disabilities" includes people with dramatically different disabilities, life chances, priorities and needs. This group identity undergirds cross-disability coalitions and much of the disability movement's success.

[39] Sociologist and disability theorist Harlan Hahn explained that the medical model of disability assesses an individual's limitations on performing roles and tasks, but not the feasibility or desirability of changing the nature of those tasks or the means of performing them. Harlan Hahn, *Toward a Politics of Disability: Definitions, Disciplines, and Policies*, 22 SOC. SCI. J. 87 (1985), *available at* http://www.independentliving.org/docs4/hahn2.html.

[40] *See* MICHAEL OLIVER, UNDERSTANDING DISABILITY: FROM THEORY TO PRACTICE 37-42 (1996) ("[D]isability, according to the social model, is all the things

For example, the medical model labels a person disabled because her legs do not function, whereas the social model would consider her disabled because the constructed environment does not include wheelchair ramps and elevators. Correspondingly the medical model's solution for disability is to "fix" the person's legs, while the social model calls for installing ramps. More specifically, the social model recognizes that the attitudes of others can be as disabling as a physical barrier or an individual's actual functional limitation. Disability discrimination legislation reflects the social model's recognition of social, physical and attitudinal barriers as sources of disability.[41]

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that impose restrictions on disabled people, ranging from individual prejudice to institutional discrimination, from inaccessible public buildings to unusable transport systems, from segregated education to excluding work arrangements, and so on."); Harlan Hahn, *Civil Rights for Disabled Americans: The Foundation of a Political Agenda*, *in* IMAGES OF THE DISABLED, DISABLING IMAGES 181, 182 (Alan Gartner & Tom Joe eds., 1987) ("A comprehensive understanding of disability requires an examination of the architectural, institutional, and attitudinal environment encountered by disabled persons."); Harlan Hahn, *Accommodations and the ADA: Unreasonable Bias or Biased Reasoning?*, 21 BERKELEY J. EMP. & LAB. L. 166 (2000) (distinguishing between impairments or medical conditions and the sociopolitical concept of "disabilities," which traces limitations "to the restraints imposed by a disabling environment instead of personal defects or deficiencies").

[41] The Supreme Court articulated this view in a Rehabilitation Act case, School Board of Nassau County v. Arline, 480 U.S. 273, 284 (1987) ("[S]ociety's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment."). The ADA endorsed this reading, as seen in the Act's legislative history, which frequently cites *Arline* to underscore that disability discrimination "often results from false presumptions, generalizations, misperceptions, patronizing attitudes, ignorance, irrational fears, and pernicious mythologies." H.R. Rep. No. 101-485, pt. 2, at 30 (1990); *id.* at 53 (1990) (citing *Arline*, 480 U.S. at 283).

Despite some veterans' early articulation of the contextual nature of disability, disability benefits determinations, whether through Social Security or the VA, are based largely on the medical model of disability. *See, e.g.*, 42 U.S.C. §423(d)(1)(A) (1994) (requiring Social Security Disability Insurance claimant to demonstrate "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment"). To the extent that disability payments compensate for limitations on earning capacity, they also reflect an economic model of disability. *See* Harlan Hahn, *Toward a Politics of Disability: Definitions, Disciplines, and Policies*, 22 SOC. SCI. J. 87 (1985), *available at* http://www.independentliving.org/docs4/hahn2.html (identifying the economic model of disability as one that equates disability with unemployability, focusing on "the roles and tasks associated with work to the exclusion of other social

The disability movement's social construction of disability is empowering in a number of respects. I will suggest only a few. First, by attributing disability discrimination to the neglect, prejudice or uninformed assumptions of others, and not to some objective shortcoming of the "disabled" individual, it negates the stigmatizing connotation of disability. Second, the social model of disability invites a critical look at the justice or the purported inevitability of existing arrangements; seeing the status quo as unjust or contingent can create an incentive to change, rather than accept, existing structures and practices. Third, identifying societal barriers as sources of disability creates political pressures and supports social policies to modify or remove them. "We should not keep you out" (by putting steps at every entrance) is a strong appeal to corrective justice. "You cannot get in" (because you cannot walk) is a tougher claim, suggesting a welfarist redistribution of resources, with the business or other entity financing the means for the individual's access.[42] Fourth, the ADA's acceptance of a social model of disability provides a legal mandate to make reasonable modifications to the environment to accommodate different modes of functioning. It also prohibits both public and private entities from making unwarranted distinctions based on present, past or perceived disabilities. On this score, it prohibits the differential treatment of people with disabilities simply because of the anticipated discomfort of others or the unfounded fears that the disability creates a safety risk.[43] Finally, as discussed

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rights and responsibilities").

[42] Here I make only a modest statement: doing justice or undoing injustice has wider political, moral and rhetorical appeal than providing "special" treatment, and treating barriers as (perhaps unthinking) discrimination is a tenet of the social model of disability, which is the dominant underpinning of the ADA. I do not enter the debate on whether or to what extent reasonable accommodations are corrective antidiscrimination measures—removing barriers or correcting practices that disfavor certain people—or redistributive mandates, imposing affirmative obligations on private employers (among others) to pay for workplace adjustments for the benefit of an individual or in service of a public policy. For a provocative, nuanced discussion of this and related issues, see Samuel R. Bagenstos, *The Americans with Disabilities Act as Welfare Reform*, 44 WM. & MARY L. REV. 921 (2003).

[43] For example, an employer may not refuse to hire a veteran with amputated

below, becoming part of a social movement and belonging to a supportive community of advocates can help combat the isolation that may accompany disability.

B. Successful broad-based disability advocacy will increase opportunities for today's veterans and those who come after them.

Veterans' advocacy may start, but cannot end, with VA programs. Disability payments, for example, are designed to compensate a veteran for income he loses because his disability limits his employability.[44] This is, in more than one sense, the least his country can do for a returning service member. But it misses a crucial point: the veteran may be less employable *not* because of his injury (or not *solely* because of it), but because of the physical and attitudinal roadblocks society puts in his way. Employers too often have stunted, stereotyped notions of what a "dis"-abled person is "able" to do. An employer may far underestimate what a disciplined, determined, resourceful, and experienced veteran can do. At the same time, the veteran, if he has not learned about the ADA and its protections, may not realize that federal law obligates the employer to consider his individual capabilities, give him a chance to demonstrate that he can perform the essential functions of the job, and make necessary and reasonable accommodations for his disability. The

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limbs or facial disfigurement simply because coworkers might consider the veteran's appearance an uncomfortable reminder of the war. Nor may the employer refuse to hire a veteran with a diagnosis of PTSD based on unfounded fears that the veteran would be disruptive, intemperate, or even violent. Rather, the employer must demonstrate by objective evidence that the veteran presents a direct threat, that is, a significant risk of substantial harm. *See* 42 U.S.C. §§ 12113(b), 12111(3) (1990) (the direct threat defense).

[44] Although women serve in Iraq and have been wounded or killed there, the vast majority of service members are men, so for simplicity, I sometimes use masculine pronouns. This seems fitting in a discussion of the cultural and political symbolism of veterans in the disability movement; the iconic soldier is male. *See generally* Dave Moniz, *Female Amputees Make Clear that All Troops Are on Front Lines*, USA TODAY, Apr. 28, 2005, *available at* www.usatoday.com/news/nation/2005-04-28-female-amputees-combat_x.htm (reporting that women account for 2% of combat deaths in Iraq).

employer's skepticism, combined with the veteran's lack of information, effectively, but needlessly, limits the veteran's job prospects. Informed veterans can help break this cycle.[45] The disabled veteran who successfully advocates for and capably performs a job dispels some of the employer's disabling assumptions. A veteran who obtains workplace accommodations may convince the employer that modifications at the margins need not impair (and may actually enhance) workplace productivity. The doors—and the minds—that the veteran opens may be a portal of opportunity for others with disabilities, civilians and veterans alike.

In short, veterans' benefits, while richly deserved and often indispensable to successful reintegration, are designed with limited goals. With the notable exception of the G.I. Bill,[46] most veterans' programs—medical care, disability compensation and other benefits—are designed principally to support the veteran, not to empower him, much less to make sure the world he returns to is free of arbitrary and discriminatory barriers to his success. The VA's motto—"to care for him who shall have borne the battle and for his widow, and his orphan"[47]—underscores its emphasis on compensating a veteran for his services and his losses (his disability), not on seeking broad social change that will transform his disability from a disadvantage to a mere difference. This is the work of the disability rights movement. While the VA reflects the belief that "there ought to be a place in the Ambulance for every faithful disabled [soldier],"[48] the disability rights movement insists

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[45] *See* Sara Corbett, *The Permanent Scars of Iraq*, N.Y. TIMES, Feb. 15, 2005, at F34 (observing that "[w]hat might save some of today's soldiers is their awareness of the struggles of past veterans and of the resources available to them now").

[46] Servicemen's Readjustment Act of 1944, ch. 268, 58 Stat. 284, *codified at* § 38 U.S.C. §§ 3451, 3698 (2000 & Supp. 2002). This is not to deny that all veterans' programs may incidentally increase a veteran's opportunities for meaningful work and a comfortable income.

[47] http://www.vba.va.gov/ (stating motto).

[48] Peter Blanck & Chen Song, *Civil War Pension Attorneys and Disability Politics*, 35 U. MICH. J.L. REF. 137, 147 (2002) (quoting Senator and soon-to-be President Benjamin Harrison).

that there ought to be a place in the community: in the city bus, the workplace, the bowling alley, city hall, the courtroom, his children's classrooms and his parents' retirement communities, retail and entertainment facilities, and elsewhere.[49]

C. Veterans can invigorate the disability rights movement with new energy, ingenuity, diversity, strength and political appeal

Veterans can add more to the disability rights movement than their sheer numbers. Media stories profiling determined veterans highlight their positive outlook and determination. Take Health Calhoun, an Iraq veteran who lost both legs in the war. Once home, he peddled his hand bike across the country to build support for injured veterans. His fellow veterans, he said, "don't want to live on benefits. They want to get out and do things."[50] Similar accounts confirm veterans' demonstrated strength, concern for others, ability to withstand adversity and "can do" mentality.

Disabled veterans also bring their own compelling political claim. Even to people who remain unresponsive to many claims of disability, returning soldiers are the "deserving disabled."[51] They acquired their disabilities in the service of their country, and the country owes them a debt of gratitude, as President

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[49] Disability rights activism already has served members of the military and their families. Consider the successful ADA lawsuit filed by residents of the military base in Fort Lewis, Washington. The 3,000 families on the base that include a person with a disability complained that the private housing contractor had failed to make the housing adequately accessible for people who use wheelchairs. Jonathan Martin, *Fort Lewis Housing to Follow Guidelines Set by Disability Act*, SEATTLE TIMES, Sept. 29, 2005, at B3, *available at* 2005 WLNR 15404294. In a settlement agreement, the housing contractor promised to make ten percent of the existing housing accessible and to follow ADA guidelines for all new construction. *Id.* This success needs to be replicated, on and off military bases.

[50] Donna St. George, *War Wounded Go to Washington*, WASH. POST, July 12, 2005, *available at* 2005 WLNR 10875141; *see* Niraj Warikoo, *Amputee's Fighting Spirit: Faster, Smarter Battleground Care Saves More U.S. War Wounded*, DET. FREE PRESS, June 4, 2005, *available at* 2005 WLNR 8865303.

[51] *See* Kathleen Kennedy, *Manhood and Subversion During World War I: The Cases of Eugene Debs and Alexander Berkman*, 82 N.C. L. REV. 1661, 1662 (2004) (citing the "citizen-soldier as the quintessential symbol of American values and protector of American freedom").

Bush recently reminded a veteran's organization:

> Our nation is grateful for your service on and off the battlefield. . . . As veterans, you have placed the nation's security before your own lives, and that sacrifice creates a debt that our country can never fully repay. . . . Our nation's debt extends not just to the veterans who served, but also to the families who stood by them in war. . . . The families of our veterans have served our country. Our nation will honor their service by standing with them in their time of need.[52]

It does not diminish the rights of *all* individuals with disabilities, however acquired, to acknowledge that veterans with disabilities have a *distinct* claim to equal opportunity as they reintegrate themselves in the country they served.[53]

The political and moral appeal of veterans' claims resonates even with people who oppose the war. We see these two convictions—oppose the war, support the warrior—coexist, for example, in *Doonesbury* cartoonist Gary Trudeau. Trudeau openly opposes the war, but encourages his readers to "value the warrior—and the sacrifices he's making in our name."[54] He helps his readers do this through B.D., a long-time *Doonesbury* character and veteran of three wars. B.D. loses a leg in Iraq and returns home with signs of PTSD. When he gets up the nerve to go to his local Vet Center, he meets with a laid-back, non-judgmental, and supremely unflappable counselor, himself a veteran who lost a leg in a Harley accident. As the counseling sessions progress, the reader is struck by B.D.'s wit and courage and becomes invested in his recovery.[55] Trudeau

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[52] Remarks of President George W. Bush, Washington, D.C., Feb. 24, 2006, *available at* http://www.whitehouse.gov/news/releases/2006/02/20060224.html.

[53] Veterans who come home to find themselves excluded from some workplaces, public transportation, and public accommodations because of a personal characteristic (a disability) have something in common with African-American veterans of World War II. They fought and sacrificed for their country, then return to that country and the realization that they are not, in fact, free to enjoy all the benefits of a free society.

[54] GBT's FAQs, http://www.doonesbury.com/strip/faqs/faq_sl.html.

[55] See Eric Bates, *Doonesbury Goes to War*, http://www.rollingstone.com/news/story/6298171/doonesbury_goes_to_war (Trudeau describing letters from readers

explains his intent in pursuing this storyline:

> The strips are about sacrifice, about the kind of shattering loss that completely changes lives. In B.D., I've placed a central character in harm's way, and his charmed life takes a dramatic turn on a road outside Fallujah. . . . What I meant to convey is that B.D.'s life has been irrevocably changed, that another chapter has begun. He is now on an arduous journey of recovery and rehabilitation. What I'm hoping to describe are the coping strategies that get people through this. . . . I won't always get it right, . . . [b]ut it seems worth doing. . . . Whether you think we belong in Iraq or not, we can't tune it out; we have to remain mindful of the terrible losses that individual soldiers are suffering in our name.[56]

Many Americans do not need a political cartoon to bring the war home to them. The high numbers of Guard members and Reservists serving in Iraq mean that there are more "military families" waiting for a loved one to return and more friends and coworkers for whom "the troops" are more than an abstract, anonymous collective. These attachments should make veterans' appeals for accessibility and opportunity especially persuasive.

D. Veterans can take part in an historic moment that could shape the direction of disability policy for themselves, their families and members of their communities.

Movements for social change do not exist in a vacuum. They are buoyed or burdened by the broader social, political or economic currents in which they navigate. Changes in legal arrangements may either prompt or be prompted by public sentiment and popular movements.[57] The disability rights move-

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who said B.D.'s injury "made them feel they had a personal stake in the war—like someone they knew had been harmed").

[56] *See* GBT's FAQs, *supra* note 54.

[57] Professor Robert Post argues that the Constitution itself is interpreted consonant with evolving cultural beliefs and values. Robert C. Post, *The Supreme Court 2002 Term Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4 (2003).

ment has both initiated and reflected political, social and cultural developments, as Professor Sam Bagenstos explains in his article examining the political and philosophical underpinnings of the ADA.[58] Drawing from a rich literature on social movement theory, Bagenstos traces the divergent perceptions, influences, political beliefs and personal commitments that informed and animated the ADA.[59] He uses the sociological concept of "framing," or ways of interpreting individual and collective experiences. Framing theory can help map ongoing developments in the disability rights movement.[60] We frame events in part through "cultural appropriation,"[61] or drawing from the broader culture "images of what is an injustice, . . . or what is a violation of what ought to be."[62] Successful social movements, Bagenstos observes, "draw on the existing political culture at the same time they seek to transform it."[63]

In today's political culture, one of the strongest images the disability rights movement could project is a veteran with disabilities.[64] History shows that disability policy has advanced

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[58] Samuel R. Bagenstos, *The Americans with Disabilities Act as Welfare Reform*, 44 WM. & MARY L. REV. 921, 1001-06 (2003).

[59] In particular, Bagenstos concludes that some disability advocates and organizations saw the ADA as an embodiment of their principles of independence and responsibility, which coincided with the Reagan-era drive to cut spending for social welfare programs like disability benefits. *Id.* at 1002-08.

[60] *Id.* at 1000 (citing ERVING GOFFMAN, FRAME ANALYSIS: AN ESSAY ON THE ORGANIZATION OF EXPERIENCE (1974)).

[61] *Id.* at 1002 (citing Doug McAdam, *Culture and Social Movements*, *in* NEW SOCIAL MOVEMENTS: FROM IDEOLOGY TO IDENTITY 36, 37-38 (Enrique LaraZa et al. eds., 1994); Mayer N. Zald, *Culture, Ideology, and Strategic Framing*, *in* COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS: POLITICAL OPPORTUNITIES, MOBILIZING STRUCTURES, AND CULTURAL FRAMINGS 261,266 (Doug McAdam et al. eds., 1996)).

[62] Bagenstos, *supra* note 58, at 1002 n.35 (citation omitted).

[63] *Id.* at 1002 (citing SIDNEY TARROW, POWER IN MOVEMENT: SOCIAL MOVEMENTS, COLLECTIVE ACTION AND POLITICS 118, 122 (1994) ("Out of a cultural toolkit of possible symbols, movement entrepreneurs choose those that they hope will mediate among the cultural underpinnings of the groups they appeal to, the sources of official culture and the militants of their movements—and still reflect their own beliefs and aspirations.")).

[64] It is simply a fact that some claims are more likely than others to capture the public's attention and imagination. *See* Peter Blanck & Chen Song, *Civil War Pension Attorneys and Disability Politics*, 35 U. MICH. J.L. REF. 137, 214 (2002)

in the wake of other wars, prompted by political, social and economic imperatives for the rehabilitation, support, care, education and reintegration of veterans.[65] The waves of disabled veterans returning from Iraq could be a turning point in public and political sentiments about people with disabilities:

> [A]fter a war or conflict the disabled veterans, cast in the role of heroes, gain the spotlight. ... People disabled by war are commonly treated as a separate category by governments; they tend to be the first to receive disability pensions or other compensation. ... However in a number of countries, the benefits first awarded returning soldiers have in time been widened to include all disabled people, whatever the cause of their disability. It is ironic that war as a major cause of disability should, by a twist of fate, be the agent for change that encourages governments to provide benefits for disabled people. Not only that, but it may also effect a change of attitude to people with disabilities. *When people wounded in conflicts are seen as heroes, the general status of disabled people is to some extent lifted.*[66]

(concluding that, now and in the past, "forces external to an individual's disability—class status, occupation, stigma, local and national political inclinations—influence conceptions of disability legitimacy, deservingness, and advocacy"); Cary LaCheen, *Achy Breaky Pelvis, Lumber Lung and Juggler's Despair: The Portrayal of the Americans with Disabilities Act on Television and Radio*, 21 BERKELEY J. EMP. & LAB. L. 223, 226 (2000) (describing the public's view of "underserving disabled," "people who are thought to be to blame for their conditions; those with hard-to-verify or easy-to-fake conditions; or with conditions many view as medicalized descriptions of lifestyle choices and behaviors"); SUSAN SONTAG, ILLNESS AND METAPHOR 6 (1990) ("Any disease that is treated as a mystery and acutely enough feared will be felt to be morally, if not literally, contagious."). Framing a message to have widespread appeal for inclusive disability policies is not a denigration of the worth of others' claims nor an endorsement of any "hierarchy" of worth among people with disabilities.

[65] *See supra* notes 19-26 and accompanying text (describing how the industrial revolution led to more workplace injuries and prompted Congress to create national rehabilitation programs for veterans and civilians); SCOTCH, FROM GOOD WILL TO CIVIL RIGHTS, *supra* note 22, at 20-22 (describing growth in rehabilitation as part of civilian war effort to channel disabled workers into war production and develop comprehensive disability services for civilians as disabled service members re-entered the civilian workforce).

[66] Ann Darnbrough, *Fighting for the Rights of the 'Heroes,'* HEALTHMATTERS MAG., Issue 8, Autumn 1991, *available at* http://www.healthmatters.org.uk/

Many Iraq veterans may not see their own experiences in this "heroes' welcome." Indeed, many seeking health care and other promised services have had to do battle with an overburdened and underfunded VA.[67] The shortcomings of the VA, however, are not a reflection of broad public sentiment supportive of the men and women who have served in the war.[68]

Veterans' contributions to increased public awareness of and support for disability rights may get a boost from another social phenomenon. The aging—and the concomitant physical and mental decline—of the ample "baby boom" generation likely presages political, cultural and market responsiveness to their concerns about physical and mental limitations.[69] Disability rights scholar and advocate Frank Bowe predicts that "this huge social force is about to boost the disability movement" and make the disability community "a lot more central in American life."[70] As baby boomers develop age-related limitations in vision, hearing and mobility, anticipates Bowe, accessibility and accommodations for these limitations will "become general, rather than special, interests."[71] If both the "young elderly" and young veterans add their considerable voices to the call for access and opportunity, this is indeed an auspicious moment for the disability rights movement.

By becoming part of this historic movement, veterans may reap rewards from the struggle itself, as well as the victories it achieves. Individuals gain strength from being part of a move-

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issue8/rightsofheroes (emphasis added).

[67] *See, e.g.*, Reynolds Holding, *Insult to Injury*, LEGAL AFFAIRS, Apr. 2005, at 26 (concluding that many "[s]ervicemen and women disabled in the line of duty" return home to find themselves facing a new enemy: the Department of Veterans Affairs").

[68] *Id.* at 31 ("People who serve in the military today command greater respect and support than at almost any other time in recent history. ... If there is a moment for reform at the Department of Veterans Affairs, it is surely now.").

[69] Frank Bowe, *Disability Meets the Boom*, RAGGED EDGE ONLINE, posted Sept. 27, 2005, *available at* http://www.raggededgemagazine.com/departments/closerlook/000106.html. The first of the 76 million baby boomers is approaching retirement, leading to the "graying of America." *Id.*

[70] *Id.*

[71] *Id.*

ment.[72] This is no secret to the men and women who develop an abiding commitment and loyalty to those who serve alongside them in a war zone. They go to war to fight for their country and find themselves fighting also for their comrades. Once back home, many speak of their urge to rejoin their fellow soldiers and their desire to "be there" for the other members of their units.[73] These veterans can develop a new sense of solidarity and mutual support with the people fighting for disability rights. In doing so, they can escape isolation, enjoy the bonds of shared commitment, multiply their ability to make a difference, and become a catalyst for historic political and social reforms in disability law and policy.

E. Veterans will have comrades and allies in the disability movement long after the Iraq War and the government's response to it have faded from the public's consciousness.

Three years into the war in Iraq, with no set date for withdrawing or reducing the troops there, we hear talk of "Iraq fatigue," or a tendency to become overwhelmed by news reports and to tune out thoughts about the war.[74] The harsh reality is that, as today's young veterans navigate decades of living with a disability, neither the VA nor the military will be on hand to

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[72] *See* Bagenstos, *supra* note 58, at 1010 (citing social movement theorists who contend that "the formation of collective identity is an important goal—and endpoint in itself" for social movements) (citing ALBERTO MELUCCI, NOMADS OF THE PRESENT: SOCIAL MOVEMENTS AND INDIVIDUAL NEEDS IN CONTEMPORARY SOCIETY 30-36 (1989)).

[73] Sara Corbett, *The Permanent Scars of Iraq*, N.Y. TIMES, Feb. 15, 2004, *available at* 2004 WLNR 5409475 (quoting disabled veteran and members of his support group wishing to be in Iraq with their "buddies"); *cf.* Michelle York, *Korean War Vet's Protest May Keep a Hospital Open*, N.Y. TIMES, Dec. 31, 2003, at B6, *available at* 2003 WLNR 5246879 (recounting devotion of a soldier fighting in Korea who never told his doctors that an injury had blinded him in one eye because he "didn't want to leave [his] buddies"); Samuel Bynes, *D-Day, in History and in Memory*, N.Y. TIMES, June 6, 2004, *available at* WLNR 5611967 (observing that soldiers in World War II fought "because their buddies [were] fighting").

[74] *See, e.g.*, Bob Herbert, *For the Maimed, Memories of Iraq Will Never Fade*, LONG BEACH PRESS TEL., Aug. 8, 2005, at A13 (criticizing the phenomenon of "Iraq fatigue," the idea that viewers, readers and editors have tired of stories of war casualties).

remove society's obstacles that limit or exclude them.[75] Post-combat rehabilitation can help equip a veteran for successful economic and social reintegration into his communities and into post-military employment, but it does nothing to make the world he is entering more accessible or accepting. This is and long will be the mission of the disability rights movement, and this is where a disabled veteran will find steadfast allies.

Advocacy by prominent veterans with disabilities has been critical at other junctures in the disability rights movement.[76] By and large, however, veterans with disabilities have not given widespread or sustained support to disability activism or aligned themselves with nonveterans with disabilities.[77] A strong identity as a veteran or as a disabled veteran does not, however, preclude engagement in and commitment to the broader disability movement, whose benefits will accrue to veterans and nonveterans alike.[78] Moreover, experienced dis-

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[75] Sara Corbett, *The Permanent Scars of Iraq*, N.Y. TIMES, Feb. 15, 2005, at F34 (referring to veterans' accurate realization that "[t]he war will stay with them, . . . but after a point the Army won't").

[76] Perhaps the most notable recent example is Senator Robert Dole's leadership and support for the ADA. Dole was injured in World War II, and his service-related disability was a reminder of the many veterans who would benefit from the ADA's passage.

[77] *See* SCOTCH, FROM GOOD WILL TO CIVIL RIGHTS, *supra* note 22, at 33 (observing that Disabled American Veterans "have not been a major participant in promoting more general programs for disabled people, focusing essentially on the needs of disabled veterans").

[78] The disability rights movement itself has had to construct a collective identity from a population often fragmented into impairment-specific identities, with separate organizations, associations and support groups. *See* SIMI LINTON, CLAIMING DISABILITY, *supra* note 38, at 12 (describing the disability movement as "a coalition of people with significant impairments, people with behavioral or anatomical characteristics marked as deviant, and people who have or are suspected of having conditions, such as AIDS or emotional illness, that make them targets of discrimination"). To advocate for broad-based inclusive disability rights is not to renounce more specific identities (for example, blind or deaf, civilian or veteran), nor yet to relinquish membership in the broader society. Successful social movements require, however, that individuals transcend their narrow identities and differences to advance their shared social position.

Nor should veterans assume that disability rights activists oppose the war or harbor any ill will toward the people who fought in it. The ADA was enacted with broad bipartisan support, and its advocates and detractors do not divide along familiar left/right, hawk/dove or Democrat/Republican lines. Disability rights

ability rights leaders may be valuable allies in designing and carrying out programs specifically for veterans with disabilities.[79]

F. Veterans may foster greater public acceptance of non-apparent disabilities, including psychological conditions.

Persons with non-apparent disabilities, including many diseases and illnesses, often have difficulty convincing others that their disability is real when they "look just fine."[80] They face incomprehension, suspicion of malingering or exaggerating, and a lack of support and accommodation of their limitations.[81] Finding ways to overcome this doubt and distrust is

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activists—like anybody else—may represent a spectrum of opinion on the Iraq War: unwavering support, categorical opposition, or somewhere in between. Moreover, people with disabilities and their allies disagree on aspects of disability theory, policy and strategy, but recognize their common interests in promoting accessibility, opportunity and full participation for all citizens.

[79] For example, the Burton Blatt Institute at Syracuse University has proposed a National Family Resource Center on Quality of Life for Disabled Veterans (NFRC) to respond to the needs of returning service members who have been injured in the Middle East. It will emphasize affordable housing, health care, mental health counseling and legal services for veterans and research, support and outreach to improve the quality of life for military families. Peter Blanck, *Tribute to the Burton Blatt Institute: Centers of Innovation on Disability at Syracuse University*, 56 SYR. L. REV. 201, 230 (2006). In another recent effort, the federal government and a non-profit mental health organization collaborated on an educational conference focusing exclusively on returning veterans. The Substance Abuse and Mental Health Services Administration (SAHMSA) and Therapeutic Communities of America sponsored a National Returning Veterans Conference in March 2006. A wide range of civilian and military specialists discussed the mental health, housing, social support and employment needs of returning veterans, their families and their communities. *See* Matt Pueschel, *SAMHSA Conference Focuses on PTSD*, U.S. MED. NEWS HIGHLIGHTS, May 6, 2006, *available at*, http://www.usmedicine.com/dailyNews.cfm?dailyID=279.

[80] Sara Corbett, *The Permanent Scars of Iraq*, N.Y. TIMES, Feb. 15, 2005, at F34 (suggesting that veterans with physical wounds "may have a slight advantage over their peers" as they readjust, as they receive more attention, treatment and opportunities to ask for help). Perhaps even more relevant, obvious physical injuries are less stigmatized than other disabilities, including diseases or mental disorders.

[81] This difficulty is compounded if, like fibromyalgia or repetitive stress injuries, the illness has not yet been widely accepted or if, like mental illnesses, it is particularly stigmatized. Prejudice about mental disorders is deep-rooted. *See*

an ongoing focus of disability rights activists.[82] Changing public (and medical) attitudes about disabilities they cannot readily "see," that is, disabilities that diverge from the paradigm wheelchair user, will benefit both civilians and veterans with chronic, progressive or recurring health problems.

Unfortunately, military service has given rise to many non-apparent illnesses, the result of injuries, environmental toxins, harsh physical conditions, the psychological trauma of the war zone, or some combination of these stressors.[83] Troops deployed to the 1991 Gulf War (Operation Desert Storm) were exposed to a staggering stew of toxic biological and chemical agents, including depleted uranium, anthrax and smoke from oil well fires.[84] Unknown thousands of exposed veterans (estimates range from 120,000 to 450,000 or more)[85] have service-

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PETER CONRAD & JOSEPH W. SCHNEIDER, DEVIANCE AND MEDICALIZATION: FROM BADNESS TO SICKNESS (1992) (tracing history of beliefs about mental disorders); Blanck & Song, *supra* note 11, at 173 (analysis showing that mental illnesses and infectious diseases were subject to severe prejudice, while musculo-skeletal injuries and more visible conditions, such as gunshot wounds, were subject to less prejudice).

[82] *E.g.*, ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 41 (1963) (discussing strategies—disclosing, concealing, minimizing, disidentifying and normalizing—for managing a non-apparent condition that would stigmatize or discredit the individual); SUSAN WENDELL, THE REJECTED BODY: FEMINIST PHILOSOPHICAL REFLECTIONS ON DISABILITY (1996) (chronicling challenges of personal interactions and professional obligations with a non-apparent, variable illness like chronic fatigue syndrome).

[83] Physical, psychological and environmental stressors may all be implicated in many service-connected medical conditions. *See* GULF WAR VETERANS, *supra* note __, at 12 (identifying psychological, environmental and physical factors among the "large number of stressors" affecting Gulf War troops).

[84] GULF WAR VETERANS, *supra* note 35, at 12 (reporting Gulf War veterans' exposure to "sand, smoke from oil well fires, paints, solvents, insecticides, petroleum fuels and their combustion products, organophosphate nerve agents, pyridostigmine bromide, depleted uranium, anthrax and botulinum toxoid vaccinations, and infectious diseases").

[85] *See id.* at 13 (complaining that the extent of the problem was not known, but noting that DoD and VA clinical registries included nearly 120,000 veterans); Mike Barber, *Ailing Veterans Blame Their MS on Gulf War*, SEATTLE POST-INTELLIGENCER, Sept. 28, 2005, at A1, *available at* www.ngwrc.org/?Page=Article&ID=2056 (reporting that 65 percent of the 700,000 U.S. troops who had served in the Gulf War had sought health care for service-related ailments and nearly 200,000 were receiving disability compensation); *Defi-*

connected health problems, many with chronic or progressive illnesses including (or coinciding with) fibromyalgia, depression, chronic fatigue syndrome, irritable bowel syndrome, chronic headaches, panic disorder and post-traumatic stress disorder.[86] The full extent of illnesses and disability is still not known,[87] and veterans continue to press their claims.

Stress and trauma can be as toxic as the hazardous biological and chemical agents that service members encounter in polluted air and water.[88] In addition to triggering or exacer-

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nition, Causes of Syndrome Are Elusive, WASH. POST (Jan. 21, 2003), at A12 (citing VA study to conclude that as many as 160,000 Gulf War veterans may have health symptoms related to the effects of dust, vaccines, tropical infections, depleted-uranium ammunition, chemical weapons agents and pesticides).

[86] GULF WAR VETERANS, *supra* note 35, at 8-9. Health surveys of other veterans deployed to the Persian Gulf revealed other health problems, including "back pain, wheezing, swelling in joints, loss of strength, blurred vision, sensitivity to chemicals, slow healing, impotence, painful intercourse, and burning semen." *Id.* at 25.

Compounding the hardship, Veterans Affairs and the Department of Defense were slow to recognize these conditions as service-related or to develop effective treatments for them. They finally responded to political advocacy by individual veterans and veterans' service organizations and pressure from elsewhere in the federal government. Congress passed legislation aimed at providing medical care for veterans with these symptoms; President Clinton established the Presidential Advisory Committee on Gulf War Veterans' Illnesses; and the General Accounting Office (GAO) and the Institute of Medicine (IOM) issued reports criticizing DoD and the VA for failure to monitor the clinical progress of Gulf War veterans. *Id.* at 14-15.

[87] More than a decade later, other serious health problems are being linked to service in the Gulf War. *See* Edward Walsh, *VA Links Gulf War, Lou Gehrig's Disease*, WASH. POST (Dec. 11, 2001), at A31 (reporting VA announcement that amyotrophic lateral sclerosis (ALS) would automatically be classified as a service-connected disease if developed by a deployed Gulf War veteran); Barber, *supra* note 85, at A1 (reporting that the VA had begun notifying about 300,000 Gulf War veterans of the potential risk of brain cancer linked to their 1991 service in the Persian Gulf).

[88] *See* GULF WAR VETERANS, *supra* note 35, at 12 (identifying psychological, environmental and physical factors among the "large number of stressors" affecting Gulf War troops); *id.* at 14 (reporting conclusion of Presidential Advisory Committee on Gulf War Veterans' Illnesses that "stress is likely to be an important contributing factor" to illnesses involving exposure to chemical and biological agents); Carla K. Johnson, *Study: Combat Trauma Seen in Civil War*, Associated Press, Feb. 8, 2006, *available at* http://www.usatoday.com/tech/science/discoveries/2006-02-06-civil-war-ptsd_v.htm?csp=34 (quoting medical researcher's conclusion that increased war trauma leads to increased

bating physical illnesses, trauma and stress can give rise to a range of mental disorders, including PTSD, depression and anxiety disorders. A recent study showed that roughly one in five Army soldiers and Marines returning from Iraq screened positive for a mental health problem.[89] And this is just the beginning. Service members were screened immediately upon their return from Iraq, and research shows that twice as many veterans report mental health concerns three to four months after their return.[90] One encouraging sign is that service members are taking advantage of mental health care at a rate higher than veterans of other conflicts. Among study participants, roughly one third of Iraq veterans used military mental health services in the year following their deployment.[91] This is still low. A recent study shows that "more than 60% of veterans of the Iraq war who screened positive for PTSD, generalized anxiety, or depression did not seek treatment."[92]

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physical and mental illnesses).

[89] Charles W. Hoge, Jennifer Auchterlonie, & Charles Milliken, *Mental Health Problems, Use of Mental Health Services, and Attrition from Military Service After Returning from Iraq or Afghanistan*, J. AM. MED. ASSOC., Mar. 1, 2006, vol. 295, no. 3, at 1023. The screening instrument, the Post Deployment Health Assessment (PDHA), did not include questions about substance abuse. *Id.* at 1025. Although the PDHA was administered to service members returning from Afghanistan and elsewhere, 71% of the assessments were provided by Iraq veterans, who are my focus. *Id.*

[90] *Id.* at 1030. Some Vietnam veterans have only recently sought treatment for service-related mental health problems. Shankar Vedentam, *A Political Debate on Stress Disorder: As Claims Rise, VA Takes Stock*, WASH. POST, Dec. 27, 2005, at A1 (reporting that VA costs for PTSD more than doubled since 1999, sparking VA proposal to review the files of 72,000 veterans, mostly from Vietnam, receiving disability compensation for PTSD), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/12/26/AR2005122600792_pf.html.

[91] Hoge, Auchterlonie, & Milliken, *supra* note 89, at 1030. This likely underestimates the rate at which service members are seeking care for mental health concerns. It does not reflect those who saw civilian health care providers. And even the military health care system may underreport mental health problems, in part to protect the service member from any stigma attaching to a mental health diagnosis. *Id.* In addition, much of the military health care system does not record traditional mental health disorder codes, and if a patient has symptoms of more than one condition, providers may not record the secondary diagnosis. *Id.* at 1031.

[92] *Id.* at 1031 (citation omitted).

These potentially disabling disorders also affect civilians. PTSD is one common casualty of the September 11 attacks on New York, and there are signs of an epidemic of PTSD among Gulf Coast survivors of the devastation of Hurricane Katrina.[93] Greater public appreciation for the distress caused by PTSD and other disorders and the need for effective treatment would benefit both the veterans who survived the chaos and losses of Iraq and the civilians who weathered Katrina.[94]

Finally, the Iraq War has shed light on yet another leading cause of cognitive and emotional impairments: traumatic brain injury, or TBI. These injuries are caused principally by improvised explosive devices (IEDs), which explode upward from the ground and hit their victims under their helmets,[95] and by shock waves from nearby explosions, which can batter a soldier's skull against his heavy Kevlar helmet, ringing his

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[93] Kim Dixon, *Post-Katrina Stress Still Weighs on New Orleans; Up to One in Three Survivors Have Untreated PTSD*, REUTERS, Feb. 15, 2006, *available at* http://lcmedia.typepad.com/katrina/2006/02/postkatrina_str.html.

[94] This is an instance in which work with veterans has benefitted the broader population. Julia Whealin et al., *The Role of Military Studies in Enhancing Our Understanding of PTSD*, PTSD RESEARCH QUARTERLY, vol. 12, no. 1, Winter 2001 (observing that "much of our research on PTSD has been conducted on war veterans" and that "[m]ilitary studies have made contributions to knowledge in this area that can be applied to non-military populations as well"); *see* Reynolds Holding, *Insult to Injury*, LEGAL AFFAIRS 26 (March/April 2005) (observing that research "at VA hospitals has led to breakthroughs in treating paralysis, chronic pain, and smallpox, and has otherwise restored the lives of thousands of veterans who returned from Iraq near death").

[95] Ronald J. Glasser, *A War of Disabilities: Iraq's Hidden Costs Are Coming Home*, HARPER'S BAZAAR, July 1, 2005, at 59, *available at* 2005 WLNR 11817885. (describing how IEDs fire shrapnel and dirt up under helmets, causing penetrating head wounds and damages to the central nervous system and muscle tissue).

These injuries can cause extensive impairments:

> Penetrating injuries can knock out specific functions like vision and speech, and may eventually cause epilepsy and increase the risk of dementia. What doctors call "closed-head injuries," from blows to the head or blasts, are more likely to have diffuse effects throughout the brain, particularly on the frontal lobes, which control the ability to pay attention, make plans, manage time and solve problems.

Denise Grady, *Struggling Back From War's Once-Deadly Wounds*, N.Y. TIMES, Jan. 22, 2006, *available at* http://www.nytimes.com/2006/01/22/national/22wounded.html?ei=5094&en=d3126b7b679246b4&hp=&ex=1137992400.

head "like a bell."[96] Nearly one in four wounded soldiers has a traumatic brain injury, prompting one observer to predict that the "true legacy of this war will be seen . . . in the cabinets of files in the neurosurgical and orthopedic wards" of Army hospitals."[97]

Supportive media coverage of returning veterans reinforces that PTSD, TBI and related disorders are casualties inflicted by trauma, not markers of personal weakness.[98] Individual veterans do a service to their comrades and fellow citizens when they speak openly about their stress-related disorders. This normalizes the symptoms, tells another veteran that he is not alone, and reminds the public that mental and emotional disorders can affect the strongest and bravest among us.[99] But prejudices die hard, and it will take concerted, sustained education (and perhaps dramatic advances in medicine or neuroscience) to eradicate them. Veterans can play crucial roles in—and derive valuable benefits from—new or ongoing anti-stigma organizations and campaigns.[100]

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[96] *Id.* Even without penetrating the skull or leaving any visible injuries, this impact can cause long-term symptoms such as "memory loss, short attention spans, muddled reasoning, headaches, confusion, anxiety, depression, and irritability." *Id.*

[97] *Id.*

[98] Sara Corbett, *The Permanent Scars of Iraq*, N.Y. TIMES, Feb. 15, 2004, *available at* 2004 WLNR 5409475 (quoting members of a veterans' support group who discuss their PTSD, depression, anxieties and other service-related disabilities).

[99] The realization that even combat soldiers are subject to depression or other mental disorders can have another positive, if subtle, effect on public perceptions. Theorists have posited the "feminization" of disability, in that society casts both women and people with disabilities as frail, weak or childlike. Cite Harlan Hahn. Military men and women with disabilities defy that image. Cite Ann Scales?

[100] See, for example, the anti-stigma campaign of the Substance Abuse and Mental Health Services Administration, profiled at http://www.mentalhealth.samhsa.gov/stigma/. For an initiative geared exclusively toward veterans, see Press release, National Mental Health Assoc., *Veterans' Day: Remember the Mental Well-Being of Our Troops*, Nov. 11, 2005, *available at* http://www.nmha.org/newsroom/system/news.vw.cfm?do=vw&rid=755 (describing Operation Healthy Reunions, a public education program to break down stigma and to ensure that returning service members receive information, support and services for coping with mental health issues).

III. CONCLUSION

This is not a celebration of war. War is disabling, directly through fear and violence and indirectly through disrupted sources of food, shelter, hygiene, medical care, sanitation and safety. War inflicts injuries and breeds illnesses, physical and mental, that develop and progress over time.

People with disabilities, in particular, have much to lose in a time of war.[101] In areas of conflict, they are less able to escape the violence and find refuge. Even far removed from the actual fighting, as here in the United States, they may see their demands for equality, opportunity and independence eclipsed by defense-related priorities. One need not celebrate war, however, to advocate equality of opportunity for veterans disabled by the war, and indeed for all Americans disabled by any cause. If disability rights advocates and veterans develop a greater appreciation of each others' past contributions and present strengths, they may form a coalition that moves us all closer to realizing the ADA's promises: the right to take part in all aspects of modern American life and the unfettered freedom "to pursue those opportunities for which our free society is justifiably famous."[102]

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[101] *See, e.g.*, Dave Reynolds, *Insurgents Used Teen With Down Syndrome As Human Bomb On Election Day*, INCLUSION DAILY EXPRESS, Feb. 2, 2005, *available at* http://www.inclusiondaily.com/ (reporting newspaper account of Iraqi insurgents using a young man with Down syndrome as an unsuspecting suicide bomber).

[102] 42 U.S.C. § 12101(a)(9) (finding that discrimination denies individuals with disabilities these opportunities).

DISABILITY, FLUIDITY, AND MEASURING WITHOUT BASELINES

Kaaryn Gustafson[*]

I. INTRODUCTION

Did the Americans with Disabilities Act of 1990 (ADA)[1] signal a tidal shift in the public lives of individuals with disabilities, or was it instead just another point in a slow and unsteady infusion of recognition that disability, despite resistance and efforts to ignore it, is a part of human existence? Did the passage of the ADA mark the high-water mark for collective action around disability in the United States? Many certainly mark the passage of the Americans with Disabilities Act as a triumphant achievement in a collective effort to recognize and secure the basic rights of persons with disabilities in the United States. The Act prohibited discrimination both in public accommodations[2] and in employment, whether public or private.[3] The ADA also established a foundation that

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[1] The American with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327-333 (codified at 42 U.S.C. §§ 12101-12213 (2000)).

[2] Title III, the public accommodations provision, prohibits discrimination that denies individuals with disabilities the "full and equal enjoyment of . . . goods, services, facilities" in public accommodations. § 12182(a).

[3] Title I, the employment provision, prohibits discrimination against qualified individuals who have an impairment that substantially limits major daily life activity, who have a history of disability under this definition, or who are regarded as having a disability. § 12102(2). It also requires that employers provide

emboldened disability rights activists worldwide, many of whom use the ADA as a touchstone for reforms in other countries.[4]

A conclusive evaluation of the ADA may prove elusive since accurately measuring the widespread effects of the ADA may be impossible: legal reforms produce multiple effects—intended and unintended, empowering and hindering. The ripple effects of the ADA—on individuals with disabilities, on workplace cultures, on public views of rights, on the disability rights movement, and on the broader movement for human rights—have likely carved subtle transformations that may never be fully appraised.

This essay examines attempts by scholars to measure the effects of the ADA (mainly on the employment of individuals with disabilities) as well as the ADA's impact on the disability rights movement in the United States. This essay scrutinizes the various measures of the ADA's effects and limitations, and ponders how a renewed effort to research disability rights might affect, or even revitalize, the disability rights movement. Section II outlines some of the research on the effects of the ADA, as well as some of its limitations. Section III highlights some emerging literature on disability rights and identity, while Section IV poses some questions that might be answered through additional research on the disability movement. Section V briefly suggests a way for social scientists and disability advocates to pursue their convergent interests. Finally, the conclusion offers thoughts on future research and theoretical analysis about rights, identity, and the future of the disability rights movement in the United States.

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reasonable accommodations to employees with disabilities. § 12112(b)(5)(A).

[4] RUTH COLKER, THE DISABILITY PENDULUM 21 (2005) ("Countries such as Canada, Australia, and Great Britain admired the willingness of the United States to enact the ADA and enacted their own disability discrimination statutes modeled after the ADA's extensive array of protections.").

II. QUANTITATIVE EMPIRICAL RESEARCH ON DISABILITY AND THE ADA'S EFFECTS

Numerous scholars who conduct empirical research have attempted to measure the effects of the ADA on the disabled and on society more generally. Recent empirical research on disability and the law tends to fall into two general categories. The first category includes quantitative research on poverty and employment, as well as research on legal outcomes under the ADA. The second general category includes research on disability rights and identity, with less focus on rights as free-standing variables and more emphasis on rights situated in knowledge and culture. A discussion of the first category of research immediately follows; discussion of the second category will be discussed in Section III.

If we measure the success of the ADA in material terms, the results are less than heartening. Studies conducted since the implementation of the ADA show that many individuals with disabilities, as they did before passage of the legislation, continue to live in poverty.[5] A number of studies of employment rates among individuals with disabilities indicate that employment and earnings rates have not increased—and have perhaps decreased slightly.[6] A decade after the ADA had passed, less than one-third of disabled working age adults engaged in the work-force, while more than eighty percent of non-disabled, working age adults were employed.[7] Possible reasons for the decline include employer fears of facing suit

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[5] *E.g.*, Marta Russell, *Backlash, the Political Economy, and Structural Exclusion*, *in* BACKLASH AGAINST THE ADA 256 (Linda Hamilton Krieger, ed. 2003) (noting that survey data may fail to portray the extreme poverty in which many individuals with disabilities live).

[6] *See., e.g.*, Daron Acemoglu & Joshua D. Angrist, *Consequences of Employment Protection? The Case of the Americans with Disabilities Act*, 109 J. POL. ECON. 915 (2001); Thomas DeLeire, *The Wage and Employment Effects of the Americans with Disabilities Act*, 35 J. HUM. RESOURCES 693 (2000); Thomas DeLeire, *Changes in Wage Discrimination Against People with Disabilities: 1984-93*, 36 J. HUM. RESOURCES 693 (2001).

[7] Russell, *supra* note 5, at 258 (drawing statistics from the 1998 United States Current Population Survey and the 2000 National Organization on Disability/Harris Survey).

under the ADA after hiring an individual with a disability and employer desires to avoid the costs of accommodations.

Scholars note that many of the existing studies have flawed research designs or offer a limited view of the overall effects of the ADA. Susan Schwochau and Peter Blanck point out that many studies of employment rates among the disabled include individuals who identify as disabled but whose impairments prevent them from working at all, and that these studies, therefore, overstate the unemployment rates of those with disabilities.[8] Kathleen Beegle and Wendy Stock note that many studies of the employment effects of the ADA do not or cannot take into account the effects of state-level disability discrimination policies, which may afford greater protections or bear higher employer costs than the ADA.[9] Other scholars point to other changes, such as increased use of Social Security benefits among those with disabilities, that may explain some of the decline in employment rates among persons with disbilities.[10]

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[8] Susan Schwochau & Peter David Blanck, *The Economics of the Americans with Disabilities Act, Part III: Does the ADA Disable the Disabled?*, 21 BERKELEY J. EMPL. & LAB. L. 271, 300 (2000); *see also* Peter Blanck et al., *Calibrating the Impact of the ADA's Employment Provisions*, 14 STAN. L. & POL'Y REV. 267, 275 (2003) (arguing "only modest consideration has been given to whether the individuals captured by the selected measure of disability are in fact ADA-qualified individuals.").

[9] Kathleen Beegle & Wendy A. Stock, *The Labor Market Effects of Disability Discrimination Law*, 38 J. HUM. RESOURCES 806, 857 (2003) (examining state-level disability discrimination laws passed prior to the ADA and finding small negative effects of the passage of state laws on labor-force participation and earnings among individuals with disabilities).

[10] John Bound & Timothy Waidman, *Accounting for Recent Declines in Employment Rates among Working-Aged Men and Women with Disabilities*, 37 J. HUM. RESOURCES 231, 232 (2002) (concluding that "the expansion of [Social Security Disability Insurance] during the 1990s played a central role in accounting for the decline in the employment of people with disabilities during this decade"); *see* Samuel R. Bagenstos, *Review: Has the Americans with Disabilities Act Reduced Employment for People with Disabilities?*, 25 BERKELEY J. EMP. & LAB. L. 527, 551 (2004) (arguing that both the expansion of SSDI and SSI eligibility and the ADA contributed to declines in employment rates for the disabled). *But see* Christine Jolls, *Identifying the Effects of the Americans with Disabilities Act Using State-Law Variation: Preliminary Evidence on Educational Participation Effects* 7 (Nat'l Bureau of Econ. Research, Working Paper No. 10528, 2004) (finding neg-

Using litigation outcomes to gauge the success of the ADA at first glance suggests limited gains for individuals with disabilities under the ADA. Ruth Colker has examined the success rates for plaintiffs who bring ADA discrimination claims before the federal courts.[11] Her studies show that success in the courts, at least in terms of outright wins at the trial court and appellate levels, has been disappointing for those who viewed the ADA as a strong tool for individual remedy and as a tool for social transformation.[12] Colker herself, though, points out that these statistics are somewhat misleading. She notes that: "Win-loss data are affected by settlement decisions. Successful settlement outcomes are beneficial to plaintiffs but are not counted in judicial outcome statistics."[13] Professor Catherine Albiston explains that this is a common problem with remedial statutes intended to promote social change: the invisibility of successful strategic settlements and the visibility of negative legal opinions communicate to judges, potential plaintiffs, and the broader public that statutory rights are of limited scope and effectiveness.[14] Thus, examining litigation outcomes does not fully measure the successes of the claims that are raised under the ADA.[15]

There have been complaints that too many people are raising claims—even frivolous claims—in federal courts under the ADA and that the low success rate of litigated cases reflect an overzealous claiming of rights under the ADA.[16] To deter-

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ative effects of the ADA on employment even after controlling for usage trends in Social Security programs).

[11] COLKER, *supra* note 4, at 69-95 (analyzing the outcomes of Title I claims in the federal courts).

[12] Ruth Colker, *Winning and Losing under the Americans with Disabilities Act*, 62 OHIO ST. L.J. 239, 277 (2001) (finding that in ADA appellate litigation claims decided September 2000 or earlier, defendants were much more likely to win than plaintiffs).

[13] COLKER, *supra* note 4, at 71-72.

[14] Catherine Albiston, *The Rule of Law and the Litigation Process: The Paradox of Losing by Winning*, 33 LAW & SOC'Y REV. 869, 871-72 (1999).

[15] Ruth Colker has analyzed the settlement data available for parties who use the Equal Employment Opportunity Commission conciliation process, but notes that these data cannot reveal the outcomes of private settlements. COLKER, *supra* note 4, at 75.

[16] A recent bill introduced in the California Senate (S.B. 855) would have

mine whether the number of claims raised is extraordinary, it would be helpful to have good baseline estimates, along various objective and subjective measures of disability, of how many Americans consider themselves disabled. There are several data sources that researchers turn to when studying disability. For example, the Census Bureau's Current Population Survey asks respondents whether they or other household members have a disability that prevents them from working.[17] Question 16 on the long form of the 2000 Census asked about "severe vision or hearing impairment" or "a condition that substantially limits" physical activity; Question 17 asks about difficulty performing day-to-day tasks.[18] The National Health Interview Survey asks about various physical problems or health conditions.[19] The Current Population Survey asks questions about health problems or disabilities that affect one's ability to work.[20] The Survey of Income and Program Participation includes questions about work disability and functional limitations. These instruments use various definitions of disability. None of the definitions employ the ADA definition of disability, which itself is vague. Moreover, surveys generally do not ask about history of impairment or other characteristics that might lead others to regard an individual

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allowed business owners four months to remedy an ADA violation before a plaintiff could bring a disability discrimination claim. The sponsor of the bill cited the need to stem "ADA lawsuit abuse." Jim Steinberg, *ADA lawsuit-reform bill dies*, San Bernardino Sun, May 5, 2005, *available at* 2005 WLNR 7146040.

[17] Questions included in the survey can be found at *Current Population Survey (CPS) Questionnaire,* available at http://www.bls.census.gov/cps/bqestair.htm.

[18] Judith Waldrop & Sharon M. Stern, *Disability Status: 2000,* CENSUS 2000 BRIEF (Mar. 2003). The American Communities Survey mirrors these questions in Questions 15 through 17. *The American Community Survey Questionnaire*, U.S. CENSUS BUREAU (2005).

[19] *See* Jeannine S. Schiller et al., *Summary Health Statistics for the U.S. Population: National Health Interview Survey, 2003*, NAT'L CTR. FOR HEALTH STATISTICS, VITAL & HEALTH STATISTICS SERIES 10, No. 224 (Apr. 2005).

[20] Question D1 asks, "Does anyone in this household have a health problem or disability which prevents them from working or which limits the kind or amount of work they can do?" *Current Population Survey Questionnaire*, CURRENT POPULATION SURVEY, *available at* http://www.census.gov/hhes/www/disability/cps/cpstableexplanation.pdf.

(or an individual to regard herself or himself) as disabled, though both having a history of disability and being regarded as disabled can confer protections under the ADA. The mismatch between survey definitions of disability and statutory definitions of disability under the ADA has been duly noted in the empirical literature as a barrier to studying the statute's effects.[21]

Individual or popular definitions of disability may vary significantly from the ADA definitions of disability articulated by the EEOC and the Supreme Court. Perhaps there are more Americans who consider themselves protected by the ADA than there actually are.[22] If there are many individuals who consider themselves disabled but who do not qualify as having an impairment that "substantially impairs a major life activity," then policymakers may want to make clearer to the public the scope of the statute.[23] Perhaps many Americans—some mistakenly and some accurately—consider themselves and others disabled under the ADA, and are using this belief in informal negotiations for workplace accommodations, in some cases successfully.[24] Increased information about perceptions

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[21] Bagenstos, *supra* note 10, at 540 (citing, inter alia, Peter Blanck, et al., *Calibrating the Impact of the ADA's Employment Provisions,* 14 STAN. L. & POL'Y REV. 267 (2003)); Douglas Kruse & Lisa Schur, *Employment of People with Disabilities Following the ADA*, 42 INDUS. REL. 1 (2003); Schwochau & Blanck, *supra* note 8.

[22] Even those who may have an impairment that substantially affects major life activities under the ADA and are protected under the public accommodations provision of the ADA would have to show that they were "qualified" employees under the employment provisions of the ADA to bring a claim.

[23] In fact, the disability most commonly alleged under ADA employment suits is back impairment. COLKER, *supra* note 4, at 93. Back impairments arise in those particular cases where the determination of whether someone is substantially impaired can be the major issue. *Id.*

[24] An interesting example of "mistaken" disability arose in the case of a fast food chain store manager who was ordered by his supervisor to reassign an employee who was missing her front teeth from her job as a cashier to a job where she could not be seen by customers. Talanda v. KFC Nat'l Mgmt. Co., 140 F.3d 1090 (7th Cir. 1998). Believing the cashier to be protected under the Americans with Disabilities Act and refusing to reassign the employee based on his belief that doing so would violate anti-discrimination law, the manager kept the cashier in her position. *Id.* at 1093. The manager was then fired for insubordination. *Id.*

of disability would be useful knowledge, especially since such information suggests a broader impact of the ADA than is currently acknowledged. Such information would be a sign that while the ADA is not leading to a lot of successful court battles by plaintiffs, it is changing the nature of the American workplace.

There are various areas that researchers have yet to explore fully and some issues that are difficult to examine through statistical analysis. What social scientists tend to measure are unsuccessful attempts to make demands under the ADA. It is, however, much more difficult to determine how many individuals have been served in the employment setting—or in public accommodations—by the ADA. Successful requests for accommodations go unmeasured, as do the number of individuals with disabilities who have found it easier over the last fifteen years to participate more fully in public life.

Also under-examined are what may be the dual effects of the ADA: on the one hand offering advantages to individuals with certain types of disabilities or with established employment backgrounds; and on the other hand, perhaps, generating resistance to employing or accommodating individuals with other types of disabilities or to those trying to enter the workforce for the first time. Indeed, the ADA may have produced dual outcomes in the employment setting. On the one hand, it may have helped individuals with certain disabilities who were already employed maintain security in their jobs and receive the accommodations that they might have been denied in the past; on the other hand, it may have made new entry into employment settings more difficult.[25] Ruth Colker

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at 1094. The manager received a right-to-sue letter from the EEOC and brought suit in federal court for retaliatory action under the ADA. *Id.* The Seventh Circuit rejected the manager's claim, stating the "cosmetically disfigured" cashier was not disabled under the ADA and the manager had no reasonable basis for believing that she was. *Id.* at 1098.

[25] "The ADA has clearly helped some people with disabilities get jobs—particularly those people with disabilities who do not need workplace accommodations. But it has just as clearly helped some people with disabilities more

has shown that demotion claims are more successful than discharge claims in the employment context, suggesting that those with well-established work histories benefited most from the ADA.[26] There is also evidence that, despite low employment rates for disabled persons, ADA claims based on the failure to hire are rarely even brought to court.[27]

Beyond the bare numbers of employment and litigation statistics, there may be more widespread effects of the ADA, particularly on public attitudes and opinion. To document public attitudes and to gauge the extent of lingering social stigma about disability, social scientists would do well, first, to create more survey instruments to measure attitudes about disability rights and, second, to draw upon the emerging literature in other disciplines.[28] While case law under the ADA clearly signals some resistance by the courts to an expansive view of disability or disability rights, it is much more difficult to measure resistance to disability rights in popular culture, among those subject to the ADA's regulations, and among those who are themselves the beneficiaries of the statute's protections. There is some evidence of resistance to compliance with the ADA among those who are subject to the public access provisions of the statute.[29] Whether this resistance reflects economic self-interest or deeper resistance to inclusion of the disabled into public life is a question requiring deeper inquiry.

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than others, and those who need accommodations may have been harmed, at least in the short run." Bagenstos, *supra* note 10, at 561.

[26] COLKER, *supra* note 4, at 92-93.

[27] SUSAN GLUCK MEZEY, DISABLING INTERPRETATIONS 70 (2005).

[28] A survey of literature on employer attitudes about employees with disabilities and attitudes about the ADA found studies showing both positive and negative attitudes toward the disabled (often dependent upon the type of disability) and positive and negative attitudes about the statute. Brigida Hernandez, Christopher Keys, & Fabricio Balcazar, *Employer Attitudes Toward Workers with Disabilities and their ADA Employment Rights: A Literature Review – Americans with Disabilities Act,* 66 J. REHABILITATION 4 (2000).

[29] *See, e.g.*, Paul Sullivan, *The Americans with Disabilities Act of 1990: An Analysis of Title III and Applicable Case Law,* 29 SUFFOLK U. L. REV. 1117 (1995) (discussing non-compliance with Title III mandates that apply to private businesses).

While empirical research on the ADA is growing, extensive studies of disability rights in the media are few. Laura Beth Nielsen and Aaron Beim, analyzing media accounts of Title VII employment discrimination claims, find that print media accounts systematically portray plaintiffs as frequent victors who are awarded sizable awards of damages.[30] They argue that such distorted representations of legal outcomes problematically affect the legal perceptions of employees, the calculations of risk conducted employers, and legal culture more generally.[31] As Ruth Colker has noted, media portrayals of the ADA have not been altogether favorable.[32] Media coverage of the ADA has tended to focus on the marginal and unsuccessful cases brought under the ADA.[33] In so doing, the media may have suggested both that the ADA is unnecessary and that those who make claims under the statue are unworthy of protection. Thorough content analysis of media portrayals of the ADA and those who bring claims under it has yet to be done.

For thicker description of disability rights in society, we need more anthropological research not only among those who identify, or are identifiable, as disabled, but also among individuals who do not describe themselves as disabled.[34] We also

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[30] Laura Beth Nielsen & Aaron Beim, *Media Misrepresentation: Title VII, Print Media, and Public Perceptions of Discrimination Litigation*, 15 STAN. L. & POL'Y REV. 237, 257 (2004).

[31] *Id.* at 257-63.

[32] COLKER, *supra* note 4, at xiii.

[33] LINDA HAMILTON KRIEGER, BACKLASH AGAINST THE ADA 8-10 (Linda Hamilton Krieger ed., 2003). Lennard J. Davis also discusses the reluctance of newspapers to print articles or opinion pieces about disability. Lennard J. Davis, *Bending Over Backwards: Disability, Narcissism, and the Law*, *in* BACKLASH AGAINST THE ADA 98, 113 (Linda Hamilton Krieger ed., 2003).

[34] The term "thick description" was coined by anthropologist CLIFFORD GEERTZ, INTERPRETATION OF CULTURES (Basic Books ed., 1973) to describe ethnography. He wrote that ethnography describes not just actions, but actions situated in culture. Geertz wrote that culture might be thought of as the "webs of significance [man] himself has spun," adding that an analysis of culture should be "not an experimental science in search of law but an interpretive one in search of meaning." *Id.* at 5. Thus law and society scholars who attempt to provide thick descriptions of rights must attempt to describe the legal and political cultures in which rights exist.

need more critical inquiry and theorizing about disability, social subordination, and the role of legal rights in fostering or fighting subordination. Some of this research, newly emerging, is described below.

III. Disability, Identity, and Rights in Action

The ADA has a normative component, legitimizing the belief that institutions both public and private ought to respond to the needs of individuals with disabilities. Both law and society scholarship and critical scholarship on law and identity engage with questions about law's normative force, the effects of legal constructions of protected categories on individual identity and collective identity, and the willingness of rights-bearing individuals to exercise valid claims.

A. Law and Society Approaches to Disability Rights

Law and society scholars tend to reject the view that legal rights should be taken simply as those articulated in statutes or as those interpreted by courts.[35] These scholars note that rights take life in and absorb meaning through their everyday use. David Engel and Frank Munger, writing about disability rights, point out that it is "essential to consider the many ways in which rights can become active in day-to-day life even when individuals do not choose to assert them."[36] They continue, "Rights can transform the sense of self simply by increasing individuals' perceptions of their own worth, or by reminding them of opportunities they could pursue if they could assume reasonable accommodations and nondiscriminatory behavior by employers."[37] Engel and Munger suggest that rights are at play even when they are not being raised as legal claims.

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[35] Susan Silbey notes, "[b]ecause law is both an embedded and an emergent feature of social life, it collaborates with other social structures . . . to infuse meaning and constrain social action." Susan S. Silbey, *After Legal Consciousness*, 1 Ann. Rev. L. & Soc. Sci. 323, 346 (2005).

[36] David M. Engel & Frank W. Munger, Rights of Inclusion 11 (2003).

[37] *Id.*

Law and society scholars explain that legal rights are not static; rather, rights are constantly redefined through the interplay among formal interpretations by institutions, individual invocations of rights, and the broader culture. Rights are not unitary and objective; they are multivalent organizing symbols and serve both to energize activists and to crystallize resistance to reforms.[38] In short, legal rights are constitutive, given life not merely by courts, but also, and perhaps primarily, through individual and organizational understandings, acknowledgement, and exercise.[39]

While many of those of who have attempted to measure the effects of the ADA have often measured its failures—the limited successes of plaintiffs who have brought suit under the statute and the narrowing of its applicability and vision—many maintain that the ADA, by establishing disability rights claims, has improved the welfare of individuals with disabilities, creating new statutory bases for requests for individual accommodations and fostering a flow of communication between disabled workers and employers. Positive changes in cultures and practices, whether in workplaces or in places open to the public, are impossible to measure systematically. Thus, many of the positive and subtle effects of the Act go uncelebrated.

What may also go unnoticed are some of the subtle and not-so-positive effects of the ADA on the lives of persons with disabilities. For example, empirical research has suggested that individuals with valid anti-discrimination claims may be reluctant to raise those claims.[40] This reluctance is by no

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[38] "If we set to one side for a moment the emblematic imagery of unity and consistency as hallmarks of law, we see that the law is a complex structure." PATRICIA EWICK & SUSAN S. SILBEY, THE COMMON PLACE OF LAW 17 (1998).

[39] In analyzing the role and discourse of rights in the pay equity movement, Michael McCann acknowledges "the constitutive role of legal rights both as a strategic resource and as a constraint for collective efforts to transform or 'reconstitute' relationships among social groups." MICHAEL W. MCCANN, RIGHTS AT WORK 7 (1994).

[40] ENGEL & MUNGER, *supra* note 36, at 91 (stating that none of their sixty research interviewees with disabilities had filed formal legal claims); *see also* KRISTIN BUMILLER, CIVIL RIGHTS SOCIETY 61-62 (1988) ("When individuals come

means limited to individuals with disabilities; empirical researchers have found that individuals with other civil rights claims are often reluctant to bring claims for fear of making waves, having to play the role of a victim, or becoming the objects of stereotypes.[41]

A recent New York Times article offers an example of this reluctance to raise disability rights claims formally.[42] The article describes a dispute where a middle school refused parents' request to have their disabled daughter's service dog accompany her to school.[43] The parents, who had been advised by attorneys to seek legal assistance, were quoted as saying, "We hesitate going to a lawyer, because this is something they [school administrators] should do because it is good. "[44] Making a legal claim transforms an existing relationship, often rendering it antagonistic.[45] Thus, there are not only economic costs to raising claims, but also personal costs. Tallying the personal costs of bringing ADA claims offers a qualitative research challenge for future scholars.

Viewing disability rights may be problematic without

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before a court, they do not present themselves as they would in everyday life; instead, they come before the court in one of their roles. In discrimination cases, the courts symbolically evoke a diminished role: the role of the victim.").

[41] *See, e.g.*, BUMILLER, *supra* note 40, at 4 ("People view the law as both protective and destructive, fearing that if they seek a legal resolution they will not gain power but lose control over a hostile situation."); Anna-Maria Marshall, *Idle Rights: Employees' Rights Consciousness and the Construction of Sexual Harassment Policies,* 39 L. & SOC'Y REV. 83, 106 (2005) (finding that even where an organization established a sexual harassment policy, women "lumped their complaints" rather than raised claims through a process they perceived as adversarial).

[42] Sue Anne Pressley, *Aid Dog Banned From Stafford School; Officials Say Teen Needs No Special Arrangements,* WASH. POST, Oct. 29, 2005, at B03.

[43] *Id.*

[44] *Id.*

[45] *See* ENGEL & MUNGER, *supra* note 36, at 112. Sid Tegler, a wheelchair-user who was interviewed by Engel and Munger and who avoided invocation of legal rights, expressed his reservations about formal disability rights this way: "I think you're antagonizing the people as a group that you may want to befriend, or at least keep on neutral terms. And it's true for a number of other groups, whether it's folks who are disabled or folks who may be of a different racial or ethnic or religious persuasion, for that matter." *Id.*

taking into account the broader culture of civil rights. Professors David Engel and Frank Munger conducted sixty in-depth interviews of individuals with disabilities to take account of the ADA's impact upon the lives of those subject to the law.[46] They found that the ADA had positive effects on individuals by transforming their perceptions of the educational and career possibilities open to them.[47] At the same time, their interviews revealed resistance to disability rights.

Engel and Munger's interviews suggest that some of the resistance to disability rights, even among those who are disabled, arises because attitudes toward rights under anti-discrimination law have been colored (so to speak) by attitudes about race, animosity toward civil rights, and racial privilege. They note that "some of our interviewees, most of whom are white, express reluctance to invoke disability rights because of what they perceive as the racial connotations of rights discourse."[48] Engel and Munger reveal that many of their interviewees equate civil rights with stigma. These scholars argue that interviewees with valid rights claims "avoid invoking the framework of rights to describe their treatment or to suggest a remedy, because to do so would equate them with a group they are unwilling to embrace as allies, a group toward which they themselves may even feel racial animosity."[49] Engel and Munger's findings suggest that rights under the ADA must be analyzed within a broader legal culture of rights. And while their interviews with individuals with disabilities are illuminating, a more thorough analysis of the interdependence of various rights discourses would be even more rewarding. To expand understandings of disability rights even further, future research in this area might interrogate the meaning of disability rights among those who do not have disabilities. Research on this issue would be particularly interesting because the permeable boundaries of disability, in contrast to other axes of

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[46] ENGEL & MUNGER, *supra* note 36.
[47] *Id.* at 95.
[48] *Id.* at 147.
[49] *Id.* at 147.

identity, make everyone a potential member of the group.[50] The question of rights producing resistance, even when those rights are potentially universal, is ripe for analysis.

It may not be the culture of civil rights alone that shapes individual understandings of disability rights. Scholarship on the role of organizations and organizational cultures in shaping rights, while emerging, has not yet blossomed in the context of disability rights. Some law and society scholars have been at the forefront in efforts to examine how organizations interpret, transform, and communicate rights to individuals who are part of them.[51] These scholars note that employment rights are shaped by employers' attitudes and interests, the structures (e.g., human resources personnel or grievance procedures) they establish to interpret and address claims, and employees' attitudes about the fairness of those structures.[52] A study by Mark Suchman and Teresa Scheid examines how employers have responded to disability rights.[53] They find that employers' substantive compliance with the ADA varies with their attitudes toward the disabled more generally and that even those who resist compliance with the law make symbolic gestures toward compliance, thereby masking their

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[50] "All of our identities change over time. If we are fortunate, we stop being young adults and eventually become old and, if we are lucky, ancient people. However, other identities, besides age, are also transitory. We may start out as able-bodied individuals, but through bad luck, age, or health misfortune we become disabled." Jerome McCristal Culp, Jr., *Seventh Aspect of Self-Hatred: Race, Latcrit, and Fighting the Status Quo,* 55 FLA. L. REV. 425, 430 (2003).

[51] *E.g.,* Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law,* 97 AM. J. SOCIOL. 1531, 1532 (1992) ("through the process of response to law, organizations construct the meaning of compliance and thus *mediate* the impact of law on society"); Lauren B. Edelman & Mark C. Suchman, *The Legal Environments of Organizations*, 23 ANN. REV. SOCIOL. 479, 505 (1997) ("[O]rganizations . . . participate actively in the social construction processes that give new laws their meanings.").

[52] *See* Sally Riggs, Lauren B. Edelman & Sharon F. Matuski, *Legal Readings: Employee Interpretation and Mobilization of Law*, 25 ACAD. MGMT. REV. 200 (2000).

[53] Teresa L. Scheid & Mark C. Suchman, *Ritual Conformity to the Americans with Disabilities Act: Coercive and Normative Isomorphism, in* THE ORGANIZATIONAL RESPONSE TO SOCIAL PROBLEMS (Stephanie W. Hartwell & Russell K. Schutt eds., 2001).

resistance.[54] This suggests that to assess actual compliance with the ADA, more research most be done about (or within) organizations, and that this research should examine the many ways organizations embrace or resist the integration of persons with disabilities into public life.

These studies all suggest that simple cause-and-effect measurements of the implementation of statutory rights are inadequate to assess the influence of rights on individuals, organizations, legal culture, and society at large. For a better view of the ADA and its infiltration into behavior and consciousness, we must use multiple methods of measurement and look for post-enactment changes not only in individual experience, but also in organizational structures, individual perceptions, legal culture, and individual identity.

B. Critical Approaches to Disability

While research on the interplay between formal rights and individual identity is emerging, there is still more analysis to be done about disability, identity, and the law. Much of Critical Race Theory ("CRT") scholarship has examined the legal construction of identity, and how identities are shaped both by oppressive state practices and by struggles, mainly through civil rights law, to resist discrimination and end oppression. Legal scholarship, however, seems to lag behind writings in disability studies in analyzing the legal construction of disability.

Identity has been central to both the disability rights movement and to legal interpretations of the ADA. Legal scholar Mary Crossley writes that disability, both as a general concept and as a category defined by the ADA, "is not a static state of being; nor need it be a fixed trait. Instead, the boundaries of the category called 'disability' are permeable, with persons moving into and, potentially, out of the category over the course of their lives."[55] While many advocates for the

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[54] *Id.*

[55] Mary Crossley, *The Disability Kaleidoscope*, 74 NOTRE DAME L. REV. 621, 625 (1999).

ADA viewed disability as a fluid and expansive category,[56] many federal courts, particularly the Supreme Court, have not. They have rejected the notion that disability is fluid and expansive category and have, one could say, squeezed out all the juice, attempting to find a firm, objective measure of disability.

Immediately after the passage of the ADA, federal courts were pressed to address the question of who is disabled.[57] Over the last fifteen years, the threshold question of whether an individual has a qualifying disability has been one of the major questions addressed by the courts. It has also been the

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[56] Section 504 of the Rehabilitation Act of 1973, a significant predecessor to the ADA, prohibited discrimination against the "handicapped" by any entity receiving federal funding. Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (codified as amended at 29 U.S.C. § 794(a) (1998)). The ADA adopted the earlier statute's definition of disability. One drafter of the ADA, described the decision to adopt Section 504's definition of disability this way:

> It was not a considered, deliberate decision to narrow the class of covered individuals from the wide-ranging group of individuals who had been covered under Section 504. Indeed, whether to use the Section 504 definition of disability was hardly a topic of conversation in negotiations on the ADA. Rather, the decision was arrived at by a small group of individuals, early in the process of drafting the ADA, who made the legal judgment that *the existing definition would cover most people with impairments along the spectrum of physical and mental impairments*, and the political judgment that using any other definition would unnecessarily slow down passage of the bill.

Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?* 21 BERKELEY J. EMP. & LAB. L. 91, 129 (2000) (emphasis added).

[57] Title I of the ADA prohibits an employer from discriminating against a qualified individual with a disability. 42 U.S.C. § 12112(a). The ADA described a disability as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual," "a record of such an impairment," or "being regarded as having such an impairment." § 12102(2)(A)-(C). Those who drafted the statute state that they created language that was broad, and in particular included the "regarded as" disabled phrase—to encompass various disabilities but also all sorts of discrimination against those who bore the stigma of disability. *See* MEZEY, *supra* note 27, at 36-37 (quoting activists who lobbied for the ADA who considered the vagueness of the language to allow its protections to extend to individuals with various disabilities); COLKER, *supra* note 4, at 65 ("[P]roponents and opponents of the ADA understood the definition of disability to have a very broad scope.").

issue under which many ADA cases are tossed out of courts.[58]

The Supreme Court first addressed the question of who is disabled under the ADA in three cases decided in 1999.[59] In one of those cases, *Sutton v. United Airlines*, two pilots were prohibited from employment as commercial airline pilots because of their severe myopia.[60] The pilots met all other employment requirements and, when wearing glasses, had acute vision.[61] The Supreme Court ruled that because the pilots' visions were fine when they took the mitigating measures of wearing corrective lenses, their visual impairment did not affect any of their "major life activities" and that they were therefore not among the individuals with disabilities protected by the ADA.[62]

In an opinion written by Justice Sandra Day O'Connor, seven justices held that Congress did not intend for the ADA to be so inclusive as to apply to everyone with a physical impairment.[63] Justice O'Connor specifically pointed to the Congressional finding of fact that 43 million Americans have disabilities as evidence that the statutory meaning of disability should be narrowly interpreted.[64] She wrote, "Had Congress intended to include all persons with corrected physical limita-

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[58] "The primary problem for plaintiffs at the trial court level is that they lose their cases at the summary judgment stage. Judges frequently grant motions by defendants for summary judgment, precluding their cases from ever getting to the jury." COLKER, *supra* note 4, at 71. "A plaintiff frequently loses at the summary judgment stage at trial because the employer successfully argues that he or she is not an individual with a disability. In that instance, the court never considers whether the plaintiff faced discrimination on the basis of a physical or mental characteristic that is irrelevant to his or her ability to perform the job." *Id.* at 104.

[59] Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999); Murphy v. United Parcel Serv., Inc., 527 U.S. 516 (1999) (holding an individual with hypertension controlled by medication is not disabled under the ADA and therefore cannot challenge policy excluding employees with hypertension); Alberton's Inc. v. Kirkingburg, 527 U.S. 555 (1999) (holding an individual with monocular vision is not disabled under the ADA).

[60] *Sutton*, 527 U.S. at 475-76.

[61] *Id.*

[62] *Id.* at 482.

[63] *Id.* at 484.

[64] *Id.* at 484-85.

tions among those covered by the Act, it undoubtedly would have cited a much higher number of disabled persons in the findings."[65] What the legislation states is, "43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older."[66] The statement that the number increases as the population grows older would suggest that it was specifically those gradual declines in physical and mental capacity, and not only major impairments, that drafters sought to include under the statute's protections. The majority of the justices, however, thought otherwise. In the end, statistics about the prevalence of disability were used to delimit the protections of the ADA.

Justice Stevens, in his dissent, argued that the ADA's provisions should be afforded a "generous, rather than miserly, construction" to fulfill the statute's remedial purpose to provide basic protection from irrational and unjustified discrimination.[67] Stevens also stated that the purpose of the statute was not to protect a small group of individuals but, instead, "to dismantle employment barriers based on society's accumulated myths and fears."[68] He expressed concern that many of those who were intended to be covered by the ADA might well be excluded under the majority's conclusion that the successful use of corrective measures places an individual outside the category of the disabled.[69] Now, whether the narrowed definition of disability expressed in this case filtered down beyond plaintiffs' and defense attorneys to popular consciousness or to individuals is a question left to empirically-minded scholars. However, other implications of narrow interpretations of disability are ripe for critical analysis.

Much recent CRT scholarship has focused on the ways

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[65] *Id.* at 487; *see also* Justice Ginsburg's concurrence, where she writes that the legislative findings were "inconsistent with the enormously embracing definition of disability petitioners urge." *Id.* at 494 (Ginsburg, J., concurring).

[66] 42 U.S.C. § 12101(a)(1).

[67] *Sutton*, 527 U.S. at 495 (Stevens, J., dissenting).

[68] *Id.* at 509-10.

[69] *Id.* at 512.

that the law manifests and redeploys systems of privilege and exclusion, as well as the ways legal categories shape and delimit our personal identities. It is high time disability rights be brought into this analysis. The history of the ADA in the courts reads as a narrowing view of the statute's protections and as a battle over who belongs to a socially and legally constructed category of identity. Critical scholars who focus on bias in the law and the legal system would describe the *Sutton* decision as a (mis)reading of legislative history that undermines the statute's goal of combating systemic exclusion of persons with disabilities from public and economic life. Justice O'Connor and her fellow justices offered legal interpretations that set stark boundaries between disability and mere difference, reduced the size of a political interest group, reset the power imbalance between employer and employee, and maintained the status quo.

Questions about legal categories and belonging loom large in critical scholarship. For example, critical scholars have productively analyzed the question of the power of non-members of a group to decide who belongs to the group in two other contexts: whiteness and Native American tribal membership. Until 1952, United States immigration law limited the right to become a naturalized citizen to persons in certain racial groups, with no exceptions placed on persons who were white.[70] Just as the courts are devoting their attention to the issue of who should be considered disabled, in the nineteenth and early twentieth-centuries the courts battled over the issue of who should be considered white.[71] Similarly, groups are taking their claims of tribal membership to the federal government, where they often have their claims for recognition delayed or rejected.[72] The power to police the boundaries be-

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[70] IAN HANEY LOPEZ, WHITE BY LAW 45-46 (1996).

[71] For an analysis of these cases, see generally Haney Lopez, *supra* note 70.

[72] *See* Jim Robbins, *Homeless for Over a Century, a Tribe Awaits U.S. Redemption*, N.Y. TIMES, Dec. 24, 2005, at A11. For scholarship on the rejection of the tribal membership and land access claims among the Mashpee Indians, see Jo Carillo, *Identity as Idiom: Mashpee Reconsidered*, 28 IND. L. REV. 511 (1995); Gerald Torres & Kathryn Milun, *Frontier of Legal Thought III: Translating*

tween majority and minority identity poses interesting questions for analysis. A long-standing interest of critical scholars has been the role of judges in determining who falls into certain legal categories that confer benefits or protections and government's interest in maintaining the status quo.

Some materialist critical scholars might argue that narrowly interpreting the ADA's definition of disability favors business interests by reducing the number of individuals who might be able to make disability-related demands, whether in employment or public accommodation. Other critical identity scholars might argue that narrow definitions reinforce the view that anti-discrimination policies should generally apply only in exceptional circumstances and not become a means of reordering day to day interactions.[73] Still others might argue that the judicial rejection of self-identification reinforces the view of those with disabilities as dependent upon the non-disabled.[74] At this point, however, extensive analysis of the potential ideological reasons for narrowly interpreting the definition of disability has not become part of CRT analyses of rights.

Critical scholarship often calls into question the core assumptions of liberal legalism, and such analysis is overdue for ADA cases. Post-*Sutton*, even disabilities specifically protected under disability rights statutes predating the ADA are not necessarily protected under the ADA. Cerebral palsy, for example, was a disability specifically mentioned in federal regulations describing the scope of coverage of Section 504 of the

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Yonnondio *by Precedent and Evidence: The Mashpee Indian Case*, 1990 DUKE L.J. 625 (1990).

[73] *See, e.g.*, ROBERTO MANGABEIRA UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT 50-51 (1986) (discussing how the distinction between suspect and permissible legal classifications under equal protection doctrine may "reinforce entrenched positions in the social division of labor and systematic, discontinuous differentials of access to wealth, power and culture").

[74] Arlene Mayerson and Matthew Diller expressed this view when they wrote—in reaction to the *Sutton* decision—that "the Supreme Court continues to look at disability as a matter for pity rather than equality." Arlene Mayerson & Matthew Diller, *The Supreme Court's Nearsighted View of the ADA*, *in* AMERICANS WITH DISABILITIES 125 (Leslie Pickering Francis & Anita Silvers eds., 2000).

Rehabilitation Act.[75] Those who drafted the ADA borrowed the definition of disability employed by the Rehabilitation Act.[76] Plaintiffs with cerebral palsy, however, have had their ADA claims dismissed in summary proceedings where defendants argued the plaintiffs were not disabled under the statute because they were not substantially limited in major life activities.[77] Indeed, individuals with cerebral palsy may not have physical impairments so severe to preclude them from daily activities. However, recognizing cerebral palsy as a category of disability falls well within the drafters' intent to address the very issues underlying disability discrimination—irrational prejudice and the stigma associated with disability.[78] Under the *Sutton* guidelines on disability, individuals who have minor impairments but who suffer considerable discrimination based on prejudice go unprotected. Critical scholars have repeatedly pointed to capacity of the most subtle, and even unconscious, discrimination to undermine equality.[79] They have also condemned the courts for failing to ad-

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[75] Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 BERKELEY J. EMP. & LAB. L. 91, 104 (2000) (citing 45 C.F.R. pt. 84, App. A. at 352, which offered a list of conditions, including cerebral palsy, that conferred protections under Section 504).

[76] The Rehabilitation Act of 1973, *supra* note 56.

[77] *See, e.g.*, McKenzie v. Target Stores, No. 3:95-2787-23, 1998 US. Dist. LEXIS 10687 (D.S.C. June 21, 1998) (holding that plaintiff with cerebral palsy was not disabled under the ADA despite motor impairment, muscle spasticity, a speech impediment, and slight hearing impairment); Cho v. Walgreen Co., 10 Am. Disabilities Cases (BNA) 527 (N.D. Ill. July 6, 1999) (holding that plaintiff whose cerebral palsy caused him to limp not considered disabled under the ADA); Thalos v. Dillon Cos., Inc., 86 F. Supp. 2d 1079 (D. Colo. 2000) (holding that plaintiff with cerebral palsy that affected her coordination, gait and speech was not disabled, though her "regarded as disabled" claim survived summary judgment motion by defense).

[78] The statute notes that individuals with disabilities have been "subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on *characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society*." 42 U.S.C. § 12101(a)(7) (emphasis added).

[79] *See* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism,* 39 STAN. L. REV. 317 (1987) (discussing the per-

dress and remedy subordination that seems apparent but that does not fall squarely within established doctrine.[80] They note that seemingly neutral interpretations of anti-discrimination law can contribute to social subordination.[81] Where critical scholars have yet to address the court's tolerance for subordination is in the area of disability.

Critical legal scholars, particularly those who identify as LatCrit scholars, view their scholarship as part of a social justice movement, a movement to dismantle social and legal subordination in its many forms. Elizabeth Iglesias and Francisco Valdes, acknowledging some of the shortcomings of LatCrit theory and its movement building efforts, write, "[O]ur engagement of disability communities and issues has been ad hoc, at best."[82] They recommend pressing "the need for growing coalitional interaction with other networks of activist scholars. We must, in other words, use the opportunities for long term planning to build on LatCrit theory's commitment to inter-disciplinary and inter-group interaction if we hope to expand the 'human resources' needed for the continued evolution of this collective project."[83]

Indeed, the LatCrit movement has work to do to extend its inclusive reach to the disability rights movement. Critical legal scholars have yet to weigh disability rights in their evaluation of rights, have yet to weigh in on debates over the legislative expansion of antidiscrimination law to the axis of

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sistence of unconscious racism and the legal system's limited ability and willingness to address it).

[80] *See* Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender,* 1991 DUKE L.J. 365 (1991) (discussing the inability of antidiscrimination law to provide a remedy where workplace policies specifically affect women of color); Mari J. Matsuda, *Voices of America: Accent Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction,* 100 YALE. L.J. 1329 (1991) (noting that Title VII does not prohibit accent discrimination though it may be used by employers as a proxy for national origin or race).

[81] *See* Matsuda, *Voices of America, supra* note 80, at 1392 (writing that liberal legalism's ideals of objectivity, neutrality and necessity have at times made existing oppression "seem natural and inevitable").

[82] Elizabeth M. Iglesias & Francisco Valdes, *LatCrit at Five: Institutionalizing a Postsubordination Future*, 78 DENV. U.L. REV. 1249, 1293 (2001).

[83] *Id.*

disability, and have yet to weigh in on the narrowing of disability rights through judicial interpretation. Nonetheless, disability rights activists and scholars have done path-breaking work without much support from other civil rights coalitions or scholarly communities. And the disability rights movement was finding commonality in difference long before the LatCrit scholars coalesced.[84]

IV. THE PAST AND FUTURE OF DISABILITY RIGHTS AS A SOCIAL MOVEMENT

While there may have been multiple pressures upon Congress that led to the passage of the ADA,[85] certainly the greatest pressure came from participants in the disability rights movement. The movement itself mobilized a cross-section of the disabled. While there has been some effort to document the history of the disability rights movement,[86] some of the more sociological questions about the convergence of people and resources that made the movement possible and the effects of the ADA itself have gone under-examined.

There is no agreed-upon yardstick for measuring the success of a civil rights movement. The civil rights gains of African Americans and women have been measured by indices of integration, economic advancement, and dramatic symbolic wins in the courts. By these measures, no civil rights move-

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[84] Disability rights scholar James I. Charlton writes, in a statement that could just as easily have been written by a LatCrit scholar, "The internal struggle of a movement to achieve the broadest possible unity while supporting its activists' individual quest for self-identity must become motive forces in any liberatory effort or project." JAMES I. CHARLTON, NOTHING ABOUT US WITHOUT US 155 (2000).

[85] Tom Burke argues that concerns among conservatives about the social welfare costs associated with non-working individuals with disabilities and their belief that the ADA would push more individuals from public benefits programs to private employment explains some of the bi-partisan support for the bill. THOMAS F. BURKE, LAWYERS, LAWSUITS AND LEGAL RIGHTS 76-77 (2002).

[86] For collections of works providing a long term history of disability rights, see PAUL K. LONGMORE, WHY I BURNED MY BOOK AND OTHER ESSAYS ON DISABILITY (2003); THE NEW DISABILITY HISTORY (Paul K. Longmore & Lauri Umansky eds. 2001).

ment has been entirely successful. Segregation persists, economic disparities remain, and court victories are rare. Still, civil rights reforms are seen as an important step in positive social transformations, particularly in undercutting irrational prejudice.

Unlike the twentieth century civil rights movement, the disability rights movement had a less coherent center, fewer charismatic leaders, and no clear geographic center of mobilization.[87] Moreover, the disability rights movement did not seem to involve a long-term strategic litigation plan or litigation home, unlike the civil rights movement for African Americans, where the NAACP played a central role and developed a careful plan for both litigation and legislative reforms.[88] A comparative analysis of the history of the disability rights movement in the United States and other civil rights movements, here and elsewhere, might shed light on the future of the movement.

Civil rights movements have a history of losing their steam once demands for formal rights are enacted by statute. Collective demands become individual rights claims.[89] Activists move from foreground to background as litigators develop strategies to best bring individual claims. The effort to articulate procedures and establish legal standards becomes the focus of reform. Major claims are quietly settled; claims made at the margins become the visible representations of the movement. Backlash develops. This is true not only for the disabili-

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[87] Many might argue, though, that Berkeley, California has served as a community, both geographically and socially, for the disability rights movement in the United States. Home to the Center for Independent Living, Disability Rights Education and Defense Fund (DREDF), the World Institute on Disability (WID), and Disability Rights Advocates (DRA), the Berkeley area produced many leaders in the disability rights movement.

[88] For an overview of the role of the NAACP in school desegregation litigation, see generally RICHARD KLUGER, SIMPLE JUSTICE (Vintage ed., 2004).

[89] Criticizing the ability of litigation to produce dramatic social change, Stuart Scheingold argues, "the tendency of litigation to break political action down into a multiplicity of individual transactions stretches out the process of implementation to the point that it can become not only tedious but counterproductive—one step forward, two steps back." STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS 8 (1974).

ty rights movement, but also other political/legal movements. The ebb and flow of the disability rights movement is ripe for description.

Perhaps more than other social movements in United States' history, the disability rights movement has a fluid constituency. The answers to what disability is and who is disabled have never been clear since physical and mental capacity exist along a broad spectrum. Disability is a social construct generally and a legal construct under the ADA. But disability is not only an external construct, it is also a self-chosen attribute, an axis of identity that, while at times has borne stigma, at other times has empowered individuals and generated community. The ADA itself reflects the efforts of a multitude of activists with various physical or mental impairments or conditions. While those who are blind, those who are deaf, those with mobility impairments, and those with mental or cognitive disorders may face different barriers to education, employment, and public participation, they have coalesced in legislative efforts to assume the broader identity of the disabled. Scholar Harlan Hahn describes these efforts to adopt the "minority group model," to foster a collective group identity as disabled and to demand legal rights as the "theoretical foundation" for the Americans with Disabilities Act.[90]

While there is some documentary history of the disability rights movement before the Americans with Disabilities Act, self-conscious reflection on the movement post-ADA has yet to materialize.

V. The Interplay Between Law, Social Science, and Social Movements

The ADA may, in some ways, have marked the crest of the disability rights movement—an end to collective action and a shift to individualized battles. But the ADA need not be the end of the collective effort to improve the lives of individu-

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[90] Harlan Hahn, *Disputing the Doctrine of Benign Neglect: A Challenge to the Disparate Treatment of Americans with Disabilities, in* AMERICANS WITH DISABILITIES 272 (Leslie Pickering Francis & Anita Silvers eds., 2000).

als with disabilities.

Linda Hamilton Krieger contends that there was backlash against the ADA during its first decade and that the backlash stems in part from the fact that it was not "supported by a broad-based popular understanding of the injustices faced by disabled people, the nature of their continuing struggle for inclusion and equality, or the particular theory of equality that informed the statutes' many ambiguous provisions."[91] She argues that the normative hold that attached to other pieces of civil rights legislation was absent from the ADA because "few people understood what the law provided, why it was important, or what core values and ideals should guide its implementation."[92] Her argument suggests that future gains for Americans with disabilities may need to develop outside the legal sphere. Cultivating information about disability, disability rights, and disability organizing may renew political attention and political momentum.

A renewed effort to study disability, identity, and the widespread influences of the ADA could raise awareness about individuals with disabilities in the United States. Beginning a free-flowing exchange of ideas across the disciplinary boundaries between disability studies, legal theory, and the social sciences would produce conduits for synergistic theory and praxis.

Social scientists helped document the need for the ADA.[93] Numerous studies referenced by advocates demonstrated the need for Congressional action by documenting the educational, economic, and employment disadvantages individuals with disabilities faced in U.S. society. As a sad irony, social science has also been used to limit the scope of the ADA's protections.[94] Social science, however, might have a

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[91] Linda Hamilton Krieger, *The Sociolegal Backlash, in* BACKLASH AGAINST THE ADA 353 (2003).

[92] *Id.* at 355.

[93] The ADA's findings of fact state "census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally." 42 U.S.C. § 12101(a)(6).

[94] Justice O'Connor's majority opinion and Justice Ginsburg's concurrence gave

role to play in the future of the disability rights movement. The interests of those who want objective data on the prevalence of disability and the effects of the ADA may well converge with those who seek to expand the legal protections and who take an expansive view of disability.

Data on disability are absent from some places where they might be found. Data sets that social scientists commonly turn to for general information about the United States population, for example the General Social Survey, do not always include information about disability. Questions about race, ethnicity, national origin, gender, and age are standard questions on most surveys. Including these axes of difference allows researchers to examine disparities. Disparities in education, income, and wealth are regularly measured to assess the progress of civil rights efforts to ameliorate those differences. Moreover, numerous questions in the General Social Survey address attitudes about members of subordinated social groups.[95] That these questions are repeated in subsequent years means that social scientists can gauge changes in opinion.

The General Social Survey, for example, includes questions, such as "In general, how close do you feel to Blacks?" and "Do you agree ... with the following statement: Irish, Italians, Jewish and many other minorities overcame prejudice and worked their way up. Blacks should do the same without special favors."[96] These questions are often analyzed to address the question of how much prejudice or stigma still exists, whether the levels have changed over time, and whether changes in policies might be affecting those attitudes. Similar questions might be asked about individuals with disabilities.

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great weight to the ADA's statement that 43 million Americans were disabled. Rather than treating this figure as a low-end estimate of the number of individuals who would benefit from the legislation, the justices treated it as a ceiling, an excuse to erode the ADA's expansive protections.

[95] *See* General Social Survey Codebook, *available at* http://webapp.icpsr.umich.edu/GSS/.

[96] *Id.*

There have been a number of recent political battles about data collection. Determining what information is gathered, what measures will be used, whether the raw data will be publicly available, and whether government studies of the data will be published and readily available have all been battles seen in other contexts recently.[97] Demanding more, and more nuanced, information about Americans with disabilities may serve as a new rallying cry for the disability rights movement.

In fact, simply raising the question of who is willing to identify oneself as disabled and who is not may spark public debate on such an issue. Physicist Werner Heisenberg theorized that it is impossible to know the exact position and the exact momentum of a particle at the same time. In short, the

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[97] In the 1990s, the Census served as a battleground for debate over collection of data about racial identity. In the 1970s, the categories were American Indian or Alaskan Native; Asian or Pacific Islander; Black or White. A separate ethnicity category allowed individuals to indicate whether they were Hispanic or Non-Hispanic. However, a 1997 revision of the Office of Management and Budget (OMB) Directive No. 15 (OMB15) expanded the number of racial categories on the 2000 Census forms. For a debate over the multiple racial identifications on the Census, compare Tanya Kateri Hernandez, *"Multiracial" Discourse: Racial Classification in an Era of Color-Blind Jurisprudence*, 57 MD. L. REV. 97 (1998) (arguing that changing the categories is both practically and ideologically problematic), with Reginald Leamon Robinson, *The Shifting Race-Consciousness Matrix and the Multiracial Category Movement: A Critical Reply to Professor Hernandez,* 20 B.C. THIRD WORLD L.J. 231(2000) (arguing that a change in the Census would transform notions about the immutability of race).

A more recent battle over statistics has arisen in the Women's Bureau in the United States Department of Labor. In 2005, the Bureau of Labor Statistics announced it would no longer collect data on gender as part of the Current Employment Statistics Survey (CESS). The change involved the elimination of one question on the survey: "Enter the number of employees from Column 1 who are women." *See* LCCR Coalition Letter to Amy A. Hobby, *available at* http://www.aclu.org/womensrights/employ/13205leg20050222.html. This one question, however, provided information that allowed social scientists, both inside and outside the government, to track women's labor force participation, gender differences in the types of jobs held, and wage disparities. More than one hundred women's organizations initiated a fight to have the question remain part of the survey and recently succeeded in foiling the change. In April 2005, bills titled "The Paycheck Fairness Act" were introduced in both the Senate (S. 841) and the House (H.R. 1687). Passage of this act would require the Secretary of Labor to collect and publish data on gendered pay disparities.

observer affects what is being observed. The same may be true of any effort to gauge constructions of disability and identity, or to measure the momentum of progressive change for disability rights. But that may not be a bad thing. Demanding that questions about disability be included on surveys, or that more articles—both popular and scholarly—be written about disability may stir up controversy, and draw attention to the issue of disability. For this reason, research and scholarship serve as potential mobilizing tools for disability activists.

At the same time, asking more questions about disability, and specifically about whether individuals identify themselves as disabled, may bring the issue into mainstream discussion. When individuals have to ask themselves whether they are disabled, and not rely on the evaluations of doctors, bureaucrats, or judges, what will they say? Until we ask, we cannot know.

VI. Conclusion

Reflecting on the past of the ADA forces one to think about the future—the future of the Act's ever-narrowing protections, the future of the disability rights movement, and the future of social scientific inquiry and theory-building around disability. Social scientists and the general public need to get involved in taking baseline measurements of the welfare of individuals with disabilities, of attitudes about rights, and of perceptions of individual identity. Moreover, the time has long passed for critical legal theorists to incorporate disability into their analyses of law and social subordination. And legal scholars, historians, and sociologists should stop treating disability rights as the forgotten step-child of civil rights in the United States. It may happen that advances in the disability rights movement will be spurred by social scientists or theorists, that lawyers will become peripheral to the movement, that courts will continue to discourage rather than liberate disabled members of society, and that progressive battles will occur outside traditional political institutions.

In many ways, the disability rights movement is unique in the context of civil rights. That does not mean, though, that

scholars should avoid analyzing disability rights under existing frames of inquiry. Until we do a better job mapping the movement and its effects, we cannot determine how far we have come and, therefore, how far we still have to go.

STARTING ANEW: THE ADA'S DISABILITY WITH RESPECT TO EPISODIC MENTAL ILLNESS

Camille A. Nelson[*]

Although lay people frequently conflate a diagnosis of mental illness with the existence of a disability, these concepts should properly be separated. The inclination towards conflation might be diminished by reference to the Americans with Disabilities Act (ADA) distinction between the existence of a disability and the legal ability to recover under the ADA. Specifically, under the ADA the claimant must not only establish a disability, which is a physical or mental impairment, but this impairment must "substantially limit one or more major life activities."[1] A disability is "an alteration of an individual's capacity to meet personal, social, or occupational demands or statutory or regulatory requirements, because of impairment."[2] Impairment, on the other hand, is "seen as a purely medical judgment, whereas the disability created by the impairment is context specific."[3]

The consideration of illnesses borne not of the physical,

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[1] The Americans with Disabilities Act (ADA) defines disability as: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2) (2000).

[2] H.R. REP NO. 101-485, pt. 2, at 50-51 (1990), *as printed in* 1990 U.S.C.C.A.N.R 267, 322-33 (*as referenced in* SUSAN STEFAN, HOLLOW PROMISES: EMPLOYMENT DISCRIMINATION AGAINST PEOPLE WITH MENTAL DISABILITIES 46 n.8 (2002)).

[3] STEFAN, HOLLOW PROMISES, *supra* note 2, at 46 (citing DEBORAH STONE, THE DISABLED STATE 110 (1984)).

but of the mental, brings entirely distinct concerns. Indeed, the traditional model which is an "impairment-handicap-disability model does not adapt well to emotional and psychological difficulties. The fundamental sorrows, despair, grayness, and broken hearts do not fit well into models that divide the body into component parts and measure impairments or deficits one part at a time, assuming that the findings represent some truth that will last beyond the next day or week."[4] These issues are not mere fanciful mental gymnastics—the statistics for persons suffering from mental illnesses (which have been diagnosed) are significant.[5] As will be discussed later, although stipulated in a racial vacuum, the figures below also cannot be abstracted from the reality of our racialized lives. Specifically, the President's New Freedom Commission Report on Mental Health found that the public health burden of mental illness is more significant than many assume, with disparate effects and outcomes for racial minorities.[6] The Report noted that an estimated 5% to 7% of adults suffer from "serious mental disorder" and that nearly 5% to 9% of children suffer from some form of "serious emotional illness."[7] The

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[4] STEFAN, HOLLOW PROMISES, *supra* note 2, at 46.

[5] While over forty-nine million people in the United States suffer from mental illness, the Center for Mental Health Services estimates that approximately 4.8 million people in the United States suffer from severe or persistent mental illnesses, as opposed to 750,000 people in the United States who are blind, 2.5 million people who suffer from epilepsy, and 15.7 million people who have diabetes *in* STEFAN, HOLLOW PROMISES, *supra* note 2, at 48. *See* Paul Steven Miller, *The Evolving ADA in* EMPLOYMENT, DISABILITY, AND THE AMERICANS WITH DISABILITIES ACT: ISSUES IN LAW, PUBLIC POLICY, AND RESEARCH 3 (Peter David Blank ed., 2000).

The Surgeon General reports that the overall annual prevalence of mental disorders is about twenty-one percent of adults and children. 1999 Dep't of Health and Hum. Serv., Mental Health: A Report of the Surgeon General, Office of the Surgeon Gen., U.S. Dep't of Health & Human Servs., Mental Health: A Report of the Surgeon General (1999), at 8-10, *available at* http://www.mentalhealth.samhsa.gov/cre/execsummary-2.asp.

[6] President's New Freedom Commission on Mental Health, *Achieving the Promise: Transforming Mental Health Care in America* 2, *available at* http://www.mentalhealthcommission.gov/reports/FinalReport/downloads/FinalReport.pdf (last visited Jan. 14, 2006).

[7] *Id.*

annual economic costs of these mental disorders has been estimated at a staggering $79 billion.[8] Sixty-three billion dollars has been attributed to lost productivity due to mental illness.[9] Additionally, incidental costs have been estimated at $12 billion for mortality costs due to lost productivity from premature death and $4 billion due to lost productivity from incarceration and lost time from the provision of family care.[10] In 1997, despite the high costs attributed to mental disorders, the United States spent over $1 trillion on health care but only $71 billion of that on the treatment of mental illnesses.[11]

Accordingly, for the mentally vulnerable the challenge of obtaining an appropriate diagnosis is but a preliminary matter in a long line of legal challenges to achieve compensation for discrimination. A higher hurdle must be met—the disability as diagnosed must negatively impact what is legally defined to be a significant life event. Thus the legal definition for "major life activities" becomes another point of contention by which those suffering from episodic mental illness are frequently barred from ADA inclusion.[12]

The assessment of what constitutes a major life activity is not without controversy. While some courts believe the ability to get along with and work with others is a major life activity, others do not.[13] However, in a racially, or sexually, toxic work

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[8] *Id.* at 3.

[9] *Id.*

[10] *Id.*

[11] *See id.*

[12] *See supra* note 1.

[13] *See* Breiland v. Advance Circuits, Inc., 976 F. Supp. 858, 863-64 (D. Minn. 1997) (stating that the ability to interact is not a major life activity due to its unworkable definition); Hook v. Georgia-Gulf Corp., 788 So. 2d 47, 55 (La. Ct. App. 2001) (stating that the ability to get along with others is not a major life activity due to its amorphous qualities as compared to other statutorily enumerated abilities). *But see* McAlindin v. County of San Diego, 192 F.3d 1226, 1234 (9th Cir. 1999) (holding that "[b]ecause interacting with others is an essential, regular function, like walking and breathing, it easily falls within the definition of 'major life activity'"), *quoted in* Ann Hubbard, *Meaningful Lives and Major Life Activities*, 55 ALA. L. REV. 997, 1005 n.49 (2004). *See also* Susan Stefan, *Delusions of Rights: Americans with Psychiatric Disabilities, Employment Discrimination and*

or school environment, the ability to get along and interact unproblematically with others may be very challenging, yet it may be *the* essential criteria on which employees are judged, especially normative outsiders.[14] In my estimation, should any institutional environment be so destructive to one's identity, the *inability* to get along with others should not be construed against the marginalized and, therefore, should be interpreted as a major life activity—in other words, the person excluded on the basis of constructed or ascribed identity should be entitled to claim disability based upon her inability to function alongside those who would do her harm. In such a context a duty to accommodate, and a justification to terminate, should arise.

Given this stance, the case of *Benjamin v. New York City Department of Health*[15] is relevant. Ms. Benjamin, a nurse of Black Jamaican heritage claimed Title VII discrimination on the basis of national origin and ADA discrimination on the basis of physical injury and mental illness.[16] Ms. Benjamin claimed that her supervisor mimicked her accent and cultural mannerisms in front of their colleagues, sabotaged her work

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the Americans with Disabilities Act, 52 ALA. L. REV. 271, 284 (2000). This article notes the contradiction that,

> [e]ssential qualifications for employment have been deemed to include the ability to get along with others. This is ironic since courts have refused to recognize the ability to get along with others as a "major life activity" for purposes of determining whether a plaintiff who is substantially limited in the ability to get along with others is disabled.

Id. (citation omitted).

[14] *See* Diggs v. Town of Manchester, 303 F. Supp. 2d 163, 166-74 (D. Conn. 2004). In this case, an African-American firefighter, claiming Title VII and ADA discrimination, was disciplined on a number of occasions based upon his interaction with colleagues or the public. *Id.* In denying his claims, the court found that "a few sporadic, racially derogatory remarks, [were] too isolated to constitute . . . a hostile work environment"; further, the court found that his "work related stress syndrome" did not support a claim for disability discrimination. *Id.* at 181-82, 185.

[15] Benjamin v. New York City Dep't of Health, No. 99-12345, 2003 U.S. Dist. LEXIS 21973, *4-5 (S.D.N.Y. Mar. 29, 2002), *vacated*, 2005 U.S. App. LEXIS 15531 (2d Cir. July 25, 2005).

[16] *Id.* at *2-3.

efforts, accused her of falsehoods, and impugned her professional reputation and credibility which led to Benjamin's becoming ill and suffering from both irritable bowel syndrome and post-traumatic stress syndrome.[17] Ms. Benjamin was terminated after returning from her second medical leave.[18]

The dismissal of this case can certainly be confined to narrow procedural grounds.[19] Equally compelling, however, is the failure of the court to decipher and address an essential part of Benjamin's case. Specifically, the plaintiff alleged continuous discriminatory practices and conduct, which occurred regularly, and further alleged ongoing health effects as the basis of her claim of disability discrimination.[20] In other words, any instances of racial harassment and harassment based upon national origin were likely the genesis of the plaintiff's mental and physical illness. Unfortunately, the court did not give much attention to these allegations, instead focusing on procedural issues. Perhaps this evinces some fundamental inadequacies of the lay interpretation of mental and physical disability generally and the limitations of the ADA specifically.

Presumably, part of the judicial challenge stems from the stigma and fear attached to mental illness. Professor Perlin has dubbed the prejudicial attitudes towards persons with mental impairments "sanism."[21] Like other "isms," sanism is an irrational bias based upon an individuals emotional or mental impairment—it is "based predominantly upon stereotype, myth, superstition, and deindividualization."[22] Also like other "isms" no one is immune from such prejudice. Indeed, as

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[17] Benjamin v. New York City Dep't of Health, No. 04-0885, 2005 U.S. App. LEXIS 15531 (2d Cir. July 25, 2005).

[18] *Id.* at *3-4.

[19] *Benjamin*, 2005 U.S. App. LEXIS 15531, at *5.

[20] *Benjamin*, 2003 U.S. Dist. LEXIS 21973, at *10-12.

[21] *See* Michael Perlin, *"Half-Wracked Prejudice Leaped Forth": Sanism, Pretextuality, and Why and How Mental Disability Law Developed as it Did*, 10 J. CONTEMP. LEGAL ISSUES 3, 4 (1999).

[22] Michael L. Perlin & Keri K. Gould, *Rashomon and Criminal Law: Mental Disability and the Federal Sentencing Guidelines*, 22 AM. J. CRIM. L. 431, 442 (1995).

Professor Perlin has noted, sanism "infects both our jurisprudence and our lawyering practices"[23]—litigation strategy and outcome, therefore, are similarly negatively impacted. Although the ADA does not stipulate that only serious or severe mental illnesses are required for claimant consideration, a reasonable reading of the relevant jurisprudence would indicate that many courts are indeed using a "combination of certain diagnoses, duration of the condition, and level of functional impairment,"[24] traditional categories for consideration of severe and persistent mental illness, to avoid compensation under the ADA.[25]

Despite this desire on the part of the judiciary to require what amounts to enhanced mental impairment—or bleeding for the court, as I will denominate the phenomenon—there is a contemporaneous disbelief attached to "invisible" illnesses, such as mental impairment. This "fear of fakery"[26] is widespread and entails the belief that despite the negative societal consequences, such as profound stigma attaching to mental

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[23] *Id.*

[24] STEFAN, HOLLOW PROMISES, *supra* note 2, at 48 (discussing the definition of severe mental illness most utilized after deinstitutionalization).

[25] People v. Hill, 803 N.E.2d 138, 145 (Ill. App. Ct. 2003); Commonwealth v. Johnston, 828 N.E.2d 568 (Mass. App. Ct. 2005), *review granted by* 835 N.E.2d 254 (Mass. 2005); *see also* ADAMHA Reorganization Act, Pub. L. No. 102-321, 106 Stat. 323, 380, 388 (1992).

> *Serious mental illness* was defined as having one 12-month disorder from the follow disorders—mood disorder, anxiety disorder, substance use disorder, antisocial personality disorder, schizophrenia, schizophreniform disorder, other nonaffective psychoses, somatization disorder, or organic brain syndrome—and being seriously impaired with impairment defined as meeting any one of the following four criteria: (a) having a severe mental illness; (b) planned or attempted suicide; (c) substantially interfered with vocational capacity; (d) serious interpersonal impairment.

STEFAN, HOLLOW PROMISES, *supra* note 2, at 48.

[26] Michael L. Perlin, *"The Borderline Which Separated You From Me": The Insanity Defense, the Authoritarian, the Fear of Faking, and the Culture of Punishment*, 82 IOWA L. REV. 1375, 1409 (1997) (stating that the "public's fear of feigned insanity defenses meshes with its fears of released insanity acquitees" where society fears a defendant successfully faking insanity "will likely be quickly released from confinement," escaping punishment and endangering the community).

illness, claimants manufacture mental sequelae in an attempt to mislead judges and jurors for their personal benefit. Such fear of faking has additional consequences for racialized persons, particularly Blacks, frequently stereotypically portrayed as sneaky, shiftless and untrustworthy.

Unfortunately, much of the work on disability rights fails to recognize overlapping identity variables. There is a tendency to analogize, as if the disability rights groups were entirely separate and distinct from the race-based civil rights groups. For instance, it is frequently pointed out that "both groups have historically been viewed as biologically inferior; blacks are seen as lazy and unintelligent, while the disabled are characterized as feeble, incapable, and are often objectified."[27] Similarly, in recognizing that disability, like race, is a sociopolitical construct and in many ways a cultural manifestation, the concept of disability is posited as similarly problematic to the concept of race.[28] As both race and disability are fluid, flexible and fluctuating concepts they problematically lack the definitiveness many would assume.[29] Of course, such conceptual ambiguity leaves room for judicial definition and exploration of these identity variables.[30]

While the disability rights work grounded in analogy to other traditional civil rights movements is very important, and indeed monumental, these analyses typically distinguish between the nature of the prejudice experienced by the racialized, as opposed to the discrimination experienced by

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[27] MICHAEL ASHLEY STEIN, *Employing People with Disabilities: Some Cautionary Thoughts for a Second-Generation Civil Rights Statute*, *in* EMPLOYMENT DISABILITY AND THE AMERICANS WITH DISABILITIES ACT: ISSUES IN LAW, PUBLIC POLICY, AND RESEARCH 52 (Peter David Blank ed., 2000) (citing ALAN GARTNER AND TOM JOE, IMAGES OF THE DISABLED, DISABLING IMAGES (1987); *see also* CLAIRE H. LIACHOWITZ, DISABILITY AS A SOCIAL CONSTRUCT: LEGISLATIVE ROOTS (1988); Marilyn J. Phillips, *Damaged Goods: Oral Narratives of the Experience of Disability in American Culture*, 8 SOC. SCI. & MED. 30 (1990).

[28] Douglas C. Baynton, *Bodies and Environments: The Cultural Construction of Disability*, *in* EMPLOYMENT DISABILITY AND THE AMERICANS WITH DISABILITIES ACT: ISSUES IN LAW, PUBLIC POLICY, AND RESEARCH 378 (Peter David Blank ed., 2000).

[29] *Id.*

[30] *Id.*

those perceived of as disabled—i.e. discrimination against African-Americans is animus based, whilst the patronizing discrimination experienced by the physically-challenged is pity based.[31] There are societal norms of unacceptability insofar as racism is concerned, yet no corollary principle in terms of pity; moreover racism operates to exclude and segregate whilst considerations of including the disabled are seldom contemplated.[32] Not meaning to diminish the value of such observations, there are a few additional matters of concern in need of exploration.

As a starting point, disability and race are not mutually exclusive categories of existence. Indeed, for much of American history these identity variables have bled into each other—race was partially defined as a failure of ability, be that mental or physical, and disability was partially defined by racialization. As Douglas Baynton has recognized, "[d]isabilty has functioned historically as a justification for inequality not just for disabled people, but covertly for women and minority groups as well."[33] In seeking to justify discriminatory treatment of women and people of color, physical infirmity, psychological infirmity and mental infirmity have been articulated, that is, disability has been projected onto numerous constructed sites of human exclusion.[34] For instance, in addition to casting the immigrant as an "undesirable ethnic" or the African-American as "feeble-minded," those in favor of restricting immigration or denying civil and political rights to racialized persons have always found solace in the ability to further taint the already marginalized by "disabling" them.[35] In this way it is somewhat artificial to compare and contrast race, gender and disability as they have been constitutive of and mutually reinforcing of each other for some time. So when the new cultural studiers of "disability in the humanities"

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[31] STEIN, *supra* note 27, at 52-53.
[32] *Id.*
[33] Baynton, *supra* note 28, at 403.
[34] *Id.* at 378.
[35] *Id.* at 404-08

investigate the manner in which popular representations attach societal meanings to bodies and seek to frame "disability as a 'culture-bound physically justified difference to consider along with race, gender, class, ethnicity, and sexuality,'"[36] I do not disagree, rather I simply wish to add one point. That is, in many cases, race is disability and in other cases, disability is race—these identity constructs are often defined by conscious, or unconscious, reference to one another.

Attempting to "move disability from the realm of medicine into that of political minorities, to recast it from a form of pathology to a form of ethnicity"[37] is a worthwhile project but ignores the reality that ethnicity and race are often pathologized according to the "ability" of the subject, just as ability is often pathologized by reference to the ethnicity or race of the subject. As one infamous New York physician stated,

> God has made the negro an inferior being... *There never could be a negro equaling the standard Caucasian in natural ability.* The same almighty creator made all white men equal—for idiots, insane people, etc. are not exceptions, they are the result of human vices, crimes, or ignorance, immediate or remote.[38] (emphasis added).

As such, perhaps more than anything, how we define those beyond our boundaries of normalcy, whether by virtue of race, gender, sexual orientation, ethnicity or (dis)abilty, defines those within the "normal"—by defining the outsider, we define the insider, the white, middle class, able-bodied, heterosexual man who is the norm.[39]

Of course, such an analysis ignores the internal fluidity of identity concepts. Just as the demarcations between races are

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[36] *Id.* at 396 (quoting ROSEMARIE G. THOMSON, EXTRAORDINARY BODIES: FIGURING PHYSICAL DISABILITY IN AMERICAN CULTURE AND LITERATURE 5-6 (1997)).

[37] Baynton, *supra* note 28, at 396 (quoting ROSEMARIE G. THOMPSON, EXTRAORDINARY BODIES: FIGURING PHYSICAL DISABILITY IN AMERICAN CULTURE AND LITERATURE 5-6 (1997)).

[38] *Id.* (quoting an unnamed doctor).

[39] *Id.* at 397.

dynamic—what was once black is now white,[40] so too there is a continuum of disability.[41] For instance, eyesight, hearing, mobility and mental health are abilities which have a spectrum of functionality, it is just that some threshold is determined below which ability is arbitrarily cast as impairment.[42] Particularly relevant for purposes of this essay, the mentally disordered are so cast by virtue of the way others respond and assess their behaviors, not from any actual functional impairment[43]—that is *we* label *their* behavior as beyond the limits of normalcy. Insiders always have the privilege of labelling outsiders. As Susan Stefan stated,

> Perversely, the "substantial limitations" clause of the disability definition provides the employer immunity to discriminate against the most stigmatized disabilities.... The requirement that an employee be substantially limited in major life activities, or to be regarded as substantially limited by the employer, is particularly problematic because it is often irrelevant to many disability-related prejudices, which arise primarily out of discomfort with difference.[44]

The totality of meaning, given the flexibility of identity and the analogizing between race and disability, is unclear. However, this complexity implies that just as the construction of race and ability is possible, so too is the deconstruction of identity along various axes, including race and ability. The continuum of identity further problematizes the manner of our legal analysis which presumes fixity and concrete notions and ways of being.

Accepting this assumed fixity of identify for the moment,

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[40] *See* JUAN F. PEREA, RICHARD DELGADO, ANGELA P. HARRIS & STEPHANIE M. WILDMAN, RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA 445-55 (2000) (describing the process of becoming white—for example, how the Irish, Italians and Jews became white). Baynton, *supra* note 28, at 389.

[41] Baynton, *supra* note 28, at 389.

[42] *Id.*

[43] Richard J. Bonnie, *Three Strands of Mental Health Law: Development Mileposts*, in THE EVOLUTION OF MENTAL HEALTH 33 (Lynda E. Front & Richard J. Bonnie eds., 2001).

[44] Stefan, *Delusions of Rights*, *supra* note 13, at 298, 303.

what of persons who occupy several supposedly fixed identities—those of mixed-identities if you will? Typically persons of mixed identities are cast as mixed race, mixed race and gender, or mixed gender/race and sexual orientation. What of the experience of women and people of color who are not able-bodied? What of the experience of women and people of color triply stigmatized by intersecting realities of racism, sexism, and sanism—it is doubtful that the proposed pity-based discrimination articulated above as descriptive of our approach to the disabled squarely attaches to these mixed-identitied individuals. Instead, one finds instances of animus-based prejudice which seeks to entirely exclude persons of color with mental illness from gainful employment particularly, and from society more generally—in this way, the very purpose of the ADA, to "overcome the barriers that prevent [] full participation in American society" is usurped.[45]

> By not receiving effective treatment, [people in the U.S. racialized as non-white] have greater levels of disability in terms of lost workdays and limitations in daily activities. Further, minorities are overrepresented among the Nation's most vulnerable populations, which have higher rates of mental disorders and more barriers to care. Taken together, these disparate lines of evidence support the finding that minorities [however defined] suffer a disproportionately high disability burden from unmet mental health needs.[46]

Accordingly, comments such as "[l]ike women, people of color, and religious minorities, people with disabilities have

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[45] Blackmon v. Unite!, No. 03 Civ.9214 GWG, 2005 WL 2038482, at *1 (S.D.N.Y. Aug. 25, 2005). ("Blackmon alleges that Unite's 'mistreatment' of herself and 'blacks in general . . . has created a hostile work environment in which there exists a culture that serves to exclude[] blacks from positions of power with the union . . . "); Baber v. McGriff Tire, Inc., No. 3:04 CV 00195 GH, 2005 WL 1926652 *1-*3 (E.D. Ark. Aug. 12, 2005) (denying defendant's motion in limine to exclude "incidents where black employees were forced to keep their shop area clean, and incidents where black customers were charged higher labor rates than whites" in a suit alleging a hostile working environment, in part, due to the race of the plaintiff); *see also* Miller, *supra* note 5, at 3.

[46] Surgeon General's Report, *supra* note 5.

had to fight for the recognition of their civil rights, battle to get legal protections, and struggle to become integrated in society,"[47] while insightful, do not recognize the intersecting reality of disability as an identity construct which coincides with all identity markers, including, but not limited to race, gender, ethnicity, sexual orientation, class and religion. Indeed, in the realm of mental disability, women and people of color are disparately impacted by mental health concerns, partly due to health care access issues and partly due to socio-economic factors which place such individuals in "high need sub-groups such as persons who are homeless, incarcerated, or institutionalized. People in these groups have higher rates of mental disorders."[48] Increased exposure to racism, discrimination, violence and poverty are some of the societal and economic inequalities facing racial and ethnic minorities in the United States which significantly tax their mental well-being, producing poor mental health.[49] The heightened burdens that racial and ethnic minorities face due to their mental illnesses is attributed more to these minorities receiving insufficient or lesser quality of care, than from their illnesses being of increased severity or societal prevalence.[50]

The reality of identity politics in the United States is that it behooves us to pay particular attention to these sub-groups since persons racialized as non-white are overrepresented in these vulnerable "high need" groups yet receive inadequate or poor quality mental health services.[51] For instance, persons of color in the U.S. "have less access to, and availability of, mental health services, are less likely to receive needed mental health services, receive poorer quality of mental health care and are underrepresented in mental health research.[52]

These issues are particularly acute for persons of color living with physical or mental illness due to a knowledge and

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[47] Miller, *supra* note 5, at 4.
[48] Surgeon General's Report, *supra* note 5.
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Id.*

information gap with respect to the ADA.[53] While all persons living with disabilities likely have insufficient knowledge about the ADA disseminated to them, this issue is particularly worrisome for people of color with disabilities who are "underreached by current ADA information and technical assistance efforts."[54] Similarly, there is a corresponding employment gap disparately impacting persons of color with disabilities.[55]

The ADA additionally imposes a difficult causal standard. Specifically, even if the Plaintiff can meet the requirement and establish that she is able to perform the essential functions of her job (either with or without accommodation), she will lose her claim if she fails to show that the discrimination or harassment was causally connected to her disability.[56] As such, in order to make out an ADA claim, Plaintiff must prove that the discrimination she experienced was exclusively "because of [her] disability."[57] As explained above, the mutually constitutive construction of identities, including disability, is important. But denying for the moment the fluidity of identity constructs, like disability, the difficulty is that some disabilities, particularly mental challenges, may be invisible, or at least not consistently evident—they may be episodic. The challenges presented by this threshold causation test are, at least, threefold.

First, outing oneself in the employment context, or any other societal context with unclear safe-spaces, may be hazardous not only to ones (mental) health, but to one's employment status and employability. Like outing oneself on the basis of

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[53] *See* William J. Hanna & Elizabeth Rogovsky, *On the Situation of African-American Women with Physical Disabilities*, 23 J. APPLIED REHABILITATION COUNSELING 39—45 (1992) (noting the following disparate full employment rates: African-American women with disabilities 25%; white women with disabilities 44%; African-American men with disabilities 57%; white men with disabilities 77%) as *referenced in* STEIN, *supra* note 27, at 63 n.41.

[54] STEIN, *supra* note 27, at 55 (quoting ADA WATCH YEAR ONE: A REPORT TO THE PRESIDENT AND CONGRESS ON PROGRESS, IN NATIONAL COUNCIL ON DISABILITY, IMPLEMENTING THE AMERICANS WITH DISABILITIES ACT at 5 (1993)).

[55] *See* Hanna & Rogovsky, *supra* note 53, at 39—45 and accompanying text.

[56] *See* Mears v. Gulfstream Aerospace Corp., 905 F. Supp. 1075, 1081 (S.D. Ga. 1995) (discussing the causal relationship between discrimination and handicap).

[57] 42 U.S.C. § 12112(a) (2000).

sexuality, where dictates of heteronormativity prevail to ostracize in many cases,[58] detailing one's mental health issues to fellow employees or employers seems a recipe for disaster, given the prevailing stigma many attach to mental illness.[59] It seems perverse that "a key part of the Plaintiff's ADA case is showing that the employer had knowledge of the handicap and that there was a causal relationship between the handicap and adverse event."[60] In other words, the mentally vulnerable must either invite the discrimination by (1) divulging what might otherwise be confidential (mental) health information just in case adverse treatment follows, or (2) being obviously mentally disturbed in some way—that is, performing their mental illness such that it can be noted, recognized as illness and negatively acted upon. Thus by claiming the identity of disability, in advance, so as not to pass as (mentally) abled, or by acting out (mental) disability in an externally cognizable, likely essentialized manner, the ADA Plaintiff paves the way for the finding of a causal connection between her mental disability and ensuing discrimination.

Second, the temporal requirements of the ADA are curious given the focus of the legislation—to be a beacon of freedom, or the equivalent of the Declaration of Independence for millions of Americans who have mental or physical disabilities.[61] In

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[58] *See* Louis J. Virelli III, *Don't Ask, Don't Tell, Don't Work: The Discriminatory Effect Of Veterans' Preferences On Homosexuals*, 38 J. MARSHALL L. REV. 1083 (2005); Courtney Weiner, Note, *Sex Education: Recognizing Anti-Gay Harassment As Sex Discrimination Under Title VII And Title IX*, 37 COLUM. HUM. RTS. L. REV. 189 (2005); Anthony E. Varona & Jeffrey M. Monks, *En/Gendering Equality: Seeking Relief Under Title VII Against Employment Discrimination Based On Sexual Orientation*, 7 WM. & MARY J. WOMEN & L. 67 (2000); Katy Chi-Wen Li, *The Private Insurance Industry's Tactics Against Suspected Homosexuals: Redlining Based on Occupation, Residence, and Marital Status*, 22 AM. J.L. & MED. 477 (1996).

[59] *See* S.S., *ex rel* Stutts v. Eastern Kentucky Univ., 307 F. Supp. 2d 853, 855 (E.D. Ky. 2004) ("Plaintiff alleges . . . that other students threw urine-soaked paper towels at him in the bathroom, threw bleach at him in the chemistry lab, assaulted him in the halls and the library, grabbed his genitals in the boys' locker room, 'extorted' money from him, and called him a 'mental retard,' 'gay,' and 'queer' because of his disabilities.").

[60] Gulfstream Aerospace Corp., 905 F. Supp. at 1081.

[61] *See* Ann Hubbard, *Meaningful Lives and Major Life Activities*, 55 ALA. L.

terms of timing, if discrimination is what precipitates or exacerbates mental illness, it would seem that the ADA claimant would be out of luck. This scenario is not an academic frolic, but rather a real question as there are work environments that are distressing or toxic which themselves precipitate mental illness.[62] In this way the causal test seems to presuppose an identity grounded exclusively in (dis)ability which subjects one to adverse treatment because of that solitary disability identity, versus adverse treatment, on whatever basis, which results in mental disability. The mental illness, as identity construct, must temporally precede the ADA finding of disability and discrimination. If negative societal reaction to another identity status precedes, indeed causes the mental disability, it is unlikely that an ADA finding of discrimination will be forthcoming. Accordingly, by leaving mentally disordered claimants out in the cold for lack of the stipulated temporal manifestation of a mental illness based identity, the ADA seems not to be the beacon of hope which the Legislators and President H.W. Bush had hoped for.

Third, a connected matter relates to the springboard from which the ADA becomes operative. Just as some disabilities are invisible or are hidden, other potential identity markers are more out in the open and obvious. For instance, often sex, race, language and ethnicity are, somewhat, discernable, albeit with imprecision. Even if incorrect ascriptions of identity are made along these lines, they are made nonetheless and reactions follow. If the discrimination is initially related to one of these more obvious identity markers, not because of the (mental) disability, the ADA claimant subsequently suffering mental health sequelae will not prevail. This is particularly troublesome given the reality of sexual and racial harassment, which takes a huge mental toll on those so victimized.[63]

REV. 997, 997 n.4 (2004) (discussing the aspirations of the President and Senators for the ADA).

[62] *See* Webb v. Baxter Healthcare Corp., No. 94-1784, 1995 WL 352485 (4th Cir. June 13, 1995) (plaintiff seeking to articulate gender, religion, and disability discrimination as leading to her depression and abuse of the drugs prescribed by her psychiatrist).

[63] *See* WILLIAM E. FOOTE & JANE GOODMAN-DELAHUNTY, EVALUATING SEXUAL

The intersectional reality of many individuals living with physical or mental disability seems largely irrelevant for purposes of the ADA. Indeed, the Surgeon General's Report insightfully addresses these issues:

> A constellation of barriers deters minorities from reaching treatment. Many of these barriers operate for all Americans: cost, fragmentation of services, lack of availability of services, and societal stigma toward mental illness (DHHS, 1999). *But additional barriers deter racial and ethnic minorities; mistrust and fear of treatment, racism and discrimination, and differences in language and communication.* The ability for consumers and providers to communicate with one another is essential for all aspects of health care, yet it carries special significance in the area of mental health because mental disorders affect thoughts, moods, and the highest integrative aspects of behavior. The diagnosis and treatment of mental

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HARASSMENT: PSYCHOLOGICAL, SOCIAL, AND LEGAL CONSIDERATIONS IN FORENSIC EXAMINATIONS (2005); Martha Chamallas, *Feminist Constructions of Objectivity: Multiple Perspectives on Sexual and Racial Harassment Litigation*, *in* APPLICATIONS OF FEMINIST LEGAL THEORY TO WOMEN'S LIVES: SEX, VIOLENCE, WORK, AND REPRODUCTION 808 (Kelly Weisberg ed., 1996); Benjamin Bowling, *Racial Harassment and the Process of Victimization: Conceptual and Methodological Implications for the Local Crime Survey*, *in* RACE, CRIME, AND JUSTICE 369 (BARBARA A. HUDSON ED., 1996); MARGARET FOEGEN KARSTEN, MANAGEMENT AND GENDER: ISSUES AND ATTITUDES 57-72 (1994); *see also* Judith A. Richman & Kathleen M. Rospenda, *Sexual Harassment and Alcohol Use*, Psychiatric Times, February 2005, *available at* http://www.psychiatrictimes. com/showArticle.jhtml?articleId=60403927 (stating that numerous studies have linked the experience of sexual harassment to "varied psychological distress outcomes including depression, anxiety, irritability, loss of self-esteem, and a sense of helplessness and vulnerability") (citing D.A. Charney & R.C. Russell, *An Overview of Sexual Harassment*, 151 Am. J. Psychiatry 10 (1994)); J. A. Richman, K. M. Rospenda, S.J. Nawyn, J.A. Flaherty, M. Fendrich, M.L. Drum & T.P. Johnson, *Sexual Harassment and Generalized Workplace Abuse Among University Employees: Prevalence and Mental Health Correlates*, 89 Am. J. Pub. Health 358 (1999) (discussing the result of a study of interpersonal workplace stressors from sexual harassment and workplace abuse as linked with mental health outcomes such as "symptomatic distress, the use and abuse of alcohol, and other drug use"); David Melmer, *Racial Discrimination Becomes Traumatic*, Indian Country Today, June 20, 2005 (exploring the effects of racial harassment and discrimination as traumatic); Office of the Surgeon Gen., U.S. Dep't of Health & Human Servs., Mental Health: Culture, Race, and Ethnicity (2001), at 8-10, *available at* http://www.mentalhealth.samhsa.gov/media/ken/pdf/SMA-01-3613/sma-01-3613.pdf.

> disorders greatly depend on verbal communication and trust between patient and clinician. *More broadly, mental health care disparities may also stem from minorities' historical and present day struggles with racism and discrimination, which affect their mental health and contribute to their lower economic, social, and political status.* The cumulative weight and interplay of all barriers to care, not any single one alone, is likely responsible for mental health disparities.[64]

Additionally, critical race and critical legal theorists have provided tremendous scholarship informing the holistic modes of existence of legal subjects such that we might more fully appreciate the multiple identity realities which people simultaneously occupy and navigate.[65] This body of scholarly inquiry recognizes that by engaging in anti-discrimination work it is instructive and informative to use analytical paradigms which recognize that greater negativity flows to those sites where multiple forms of oppression converge—identity work should not proceed on the basis of mutual exclusivity. Rather a contextual and holistic appreciation of the way in which discrimination and prejudice operate recognizes that systems of domination, be that racism, sexism, homophobia, classism, or sanism, whatever form of intolerance, are interlocking, intermingling, mutually reinforcing, and constitutive of each other.

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[64] Surgeon General's Report, *supra* note 5 (Executive Summary, Main Findings) (emphasis added).

[65] *See* Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991); Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365 (1991); Mari J. Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition*, 43 STAN. L. REV. 1183 (1991); Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 3 (1995); Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-Racist Politics*, 47 BUFF. L. REV. 1 (1999); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Mari J. Matsuda, Univ. of Haw. & William S. Richardson Sch. of Law, Keynote Address at the Yale Law School Conference on Women of Color and the Law: When the First Quail Calls: Multiple Consciousness as Jurisprudential Method (April 16, 1988), *in* 11 WOMEN'S RTS. L. REP. 7 (1989).

Accordingly, the singularity of discrimination recognized by the ADA, the most recently introduced wide scale antidiscrimination legislation, and its jurisprudential interpretation, is disappointing, in light of the breadth and depth of contemporary understandings of intersecting identities. By conceiving of disability as narrowly running along an isolated axis, ADA jurisprudence oversimplifies reality, essentializes, and requires identity splitting.[66] The ADA forces a reliance on and claiming of dominant identities (by displaying a record of impairment), the performance of illness (by requiring "mental impairment that substantially limits major life activity"), and deference to external ascriptions of disabled identities (the "regarded as having an impairment" test).

For instance in the case of *Mears v. Gulfstream Aerospace Corp.*[67] the court goes to great lengths to point out that the claimant, a woman suffering from work related stress, including allegations of sexual harassment and its mental health sequelae, who consequently developed agoraphobia and dythmia, failed to show that any activity undertaken by her former employer was "because" of her disability.[68] A main reason for the dismissal of Plaintiff's case was that "[s]he at no time told anyone she had a disability."[69]

Appropriately, after she was diagnosed the company approved a short term disability leave. However, if one's disability is invisible, it behooves a potential ADA claimant to ensure the appropriate evidentiary thresholds are met—a diagnosis is necessary, in the absence of obvious disability—mental disability must be authenticated for the court by deference to the appropriate expert and such authentication must be temporally located. But the decision of the court in *Mears* is even more

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[66] Identity splitting is the phenomenon of treating identities as singular, parallel and separate—one is forced to identify along a single axis, thereby splitting oneself into incomplete, yet legally digestible, subparts.

[67] 905 F. Supp. 1075 (S.D. Ga. 1995).

[68] This case evinces the struggle of courts in determining whether to frame the case as a civil rights, workman's compensation, or ADA matter. *Id.*; *see also* STEFAN, HOLLOW PROMISES, *supra* note 2, at 32.

[69] *Gulfstream Aerospace Corp.*, 905 F. Supp. at 1081-82.

disconcerting in its unwillingness to attribute the genesis of the disability to the source in a legally compensable way.

> Furthermore, Sheila has shown that it is all of the stress related events that occurred while she was employed that caused the disability with which she has been formally diagnosed. *If the job itself caused the disability, the employer cannot fairly be accused of discrimination because of that disability,* at least in cases such as this one, where the Plaintiff essentially stopped working because of a job-caused disability, then never came back. In that sense, *she never gave the employer a "chance" to discriminate because of the disability.*[70]

The creation of such a curious jurisprudential opportunity is disconcerting—indeed, the creation of the chance to discriminate might be judicial folly. Surely it should suffice that discrimination actually took place with detrimental (mental health) sequelae. It might be that such a ruling does not make sense in light of the aims of the ADA—to be a source of liberation for persons with mental and physical illness. The court acknowledged that the employment situation caused the disability—the disability existed and had been appropriately authenticated by a psychiatrist, an expert. What is missing is the quintessential chicken and egg debate—Ms. Mears's identity as mentally disabled did not come *before* the alleged sexual harassment and alleged inappropriately stressful employment situation. Any allegedly adverse employer behavior must be grounded in the singularity of constructed disability—discrimination must exist solely because of the disability. The disability cannot find its genesis from adverse treatment grounded in alternative or mixed identity constructs. In the words of the court, "[t]here is not a scintilla of evidence in the record that anything Gulfstream or its employees did while Plaintiff worked there was because of, directed at, or related to any disability she might have had."[71]

Of course, we now know that prejudice travels in

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[70] *Id.* at 1081 (emphasis added).
[71] *Id.* at 1082.

packs—like predators, those who would prey upon others do not parse identity with nicety, articulating with precision the basis upon which they seek to disempower. Instead, the reality of any form of discrimination is that they blend into each other, reinforce and constitute each other and absorb each other. Like a lava-lamp, forms of discrimination morph, merge, emerge from, and fold into each other—discrimination is constantly evolving and is never static. Accordingly, any legally cognizable sexual harassment claim should have been reinforced by the disability claim, and any disability claim should have been reinforced by the harassment claim—this would have been more consistent with a reality of interlocking trajectories of discrimination. Instead, the court held, "[s]ince Plaintiff does not allege this harassment was directed at her because of her disability, it has no relevance to her ADA claim."[72] Thus, if the stresses of racial or sexual harassment lead to the development of a disability, the remedy lies elsewhere.[73]

Unfortunately, this reality of toxic work and school environments is indeed the case for many women and people of color. As the ADA clearly "only prohibits discrimination because of a person's disability,"[74] many claimants with multiple identities, which include a disability, will be shut out in the absence of their being able to previously access treatment which diagnoses their illness, or adequate performance of their illness—either expert authentication of the existence of the identity construct is required, or external, supposedly objective, lay recognition of manifested mental disability is required. In either case, bleeding for the court is a prerequisite to recovery.

There, however, is some hope to be gleaned from *Sanders v. City of Chicago*.[75] Joseph Sanders, a former Chicago Police Officer, brought a suit for employment discrimination based

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[72] *Id.*

[73] *Id.* "The ADA . . . is not a catch-all remedy for sexual harassment claims on which the statute of limitations has run... If the stresses of her job caused Plaintiff to develop a disability, then her remedy lies elsewhere in the law." *Id.*

[74] *Id.*

[75] Sanders v. City of Chicago, No. 98-C-5838, 2000 U.S. Dist. LEXIS 1753 (D. Ill. Feb. 10, 2000).

upon race discrimination and hostile work environment under Title VII of the Civil Rights Act, but he also alleged disability discrimination and retaliation under the ADA against the Defendant City of Chicago.[76] Specifically, Sanders, a Black man, was diagnosed with "emotional stress syndrome"[77] by the city of Chicago's doctor and was moved from his post as a patrolman, to the Canine Unit and finally to the Call Back Unit before he resigned.[78] Sanders alleged being subjected to racial slurs[79] and to being racially excluded from work functions.[80] In rejecting the defendant's motion to dismiss Sanders's Title VII and ADA claims the court emphasized that Sanders "has plead [sic] sufficient facts to allege a materially adverse employment action," and that the police department had "regarded Sanders as having a disability" and, accordingly, Sanders had established the existence of a disability as required by the ADA.[81]

While strongly encouraging the parties to discuss settlement possibilities, at least the court was not dismissive of the possibility of a Title VII and ADA claim functioning in tandem.[82] Additionally, the court recognized that if the plaintiff suffered from emotional stress syndrome, the police department had a duty to accommodate him.[83] Two matters are important at this point. First, emotional stress syndrome is not even "defined as a disability under the ADA[84] and has not been offi-

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[76] *Id.* at *2.

[77] The DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS defines acute stress disorder as the "development of characteristic anxiety, dissociative, and other symptoms that occurs within one month after exposure to an extreme traumatic stressor." DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 429 (4th ed. 1994).

[78] *Sanders*, 2000 U.S. Dist. LEXIS 1753, at *3.

[79] Sanders claimed that a Police Commander referred to him as a "Boy" and told him that "[his] type should be put in [his] place." *Id.*, at *5.

[80] Sanders claimed that he was not allowed to attend a police department-sponsored retirement party, while non-Black retiring officers were allowed to attend. *Id.* at *4.

[81] *Id.* at *19, *21.

[82] *Id.* at *19, *21.

[83] *Id.* at *19.

[84] The regulations implementing Title I of the ADA define mental impairment

cially interpreted as such by any courts."[85] The fact that the court, nonetheless took an expansive view of mental disability necessitating accommodation is admirable. Indeed, this is the type of diagnosis one might expect for the many racialized persons suffering in toxic work or study environments, given the reality of racial harassment.

Secondly, the court articulated the usual test for the requirement of accommodation. Namely, the plaintiff must allege:

> (1) he was or is disabled; (2) Defendant was aware of his disability; (3) he was otherwise qualified for his job; and (4) the disability caused the adverse employment action (a factor which is implied if not stated).[86]

It is the last criteria with which I am most concerned. In conceding that the potentially racially informed diagnosis of emotional stress syndrome caused the negative employment action, the court might well be taking the first step towards an intersectional approach to the ADA. By expanding the conceptualization of a mental disability sufficient to trigger ADA application, the United States District Court for the Northern District of Illinois, Eastern Division might be allowing for an unfolding of the critical race perspective on interlocking, interconnected, constitutive identity variables so often ignored in American jurisprudence.

Further, given that there are three ways in which an ADA plaintiff might establish the existence of a disability—having a physical or mental impairment that substantially limits at least one major life activity, having a record of impairment or being regarded as having an impairment—it is reassuring that the court did not require that Sanders "out" himself unnecessarily by disclosing his particular mental vulnerabilities[87] or

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as including "any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." Courts have interpreted the language of mental impairment to include the most readily recognized DSM diagnoses, including schizophrenia, depression, and bipolar disorder. STEFAN, HOLLOW PROMISES, *supra* note 2, at 47.

[85] *Sanders*, 2000 U.S. Dist. LEXIS 1753, at *20.

[86] *Id.* at *19.

[87] Indeed, upon notification that Mr. Sanders had fainted whilst off-duty, he

that Sanders perform his mental disability to claim recourse under the ADA. Instead, the court properly looked at the treatment inflicted upon Mr. Sanders and surmised that the underlying reason for the ill-treatment was likely the perception others had of him based upon his being (a Black man) with an emotional disturbance.[88] In this way the court properly treated Sanders's mental disability as other identity constructs are judicially assessed, as a construct triggering adverse treatment, and not driven by a record of i.e., Blackness, being regarded as Black, or performing Blackness.

An examination of the treatment of the mentally and physically ill, in my opinion, should be the essential test for whether discrimination on the basis of (dis)abilty has taken place—the ascription of otherness by an external observer with detrimental consequence should be paramount, not whether the file has been papered sufficiently to show a record of mental illness, nor whether the claimant is limited in their essential functioning (but of course not too limited as to be incapable of accommodation). As with other discriminatory perpetrators, those operating with animus against persons with mental or physical disabilities do not parse their prejudice that finely—they do not undertake the calculus of how much their target is able to accomplish nor do they necessarily examine their medical or employment records to discern their record of impairment. Rather it is sufficient that they perceive their victim sufficiently unlike them—they "other" their victim, to the point of dehumanization if necessary. As discussed above, such marginalization is easier the more identity variables of departure one strays from the norm of the heterosexual, white, able-bodied, middle class man. It is my hope, therefore, that as we celebrate the fifteenth anniversary of this seminal legislation, new life is breathed into ADA jurisprudence which reflects upon some of the matters discussed above. If so, we might start anew towards achieving the fullness and rich possibilities for

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was instructed to take medical leave and then diagnosed by the defendants psychiatrist as suffering from emotional stress syndrome. *Id.*

[88] *Sanders*, 2000 U.S. Dist. LEXIS 1753, at *20.

which the ADA was originally enacted.

COMMENT

How Bizarre? The Application of Reasonable Accommodation to Employees "Regarded As" Disabled Under the ADA Does Not Necessarily Lead to Bizarre Results

I. Introduction

The Americans with Disabilities Act (ADA) was enacted in 1990 with the purpose of prohibiting disability-based discrimination against individuals with disabilities in the areas of employment,[1] public services,[2] and public accommodations and services operated by private entities.[3] This comment focuses on employment issues under Title I of the ADA and discusses why individuals "regarded as" disabled should be afforded the same reasonable accommodations that are given to qualified individuals with physical or mental impairments that substantially limit a major life activity or a record of such

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[1] *See* 42 U.S.C. §§ 12111-121187 (2004). "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. §12112(a) (2004).

[2] *See* 42 U.S.C. §§ 12131-12165 (2004).

[3] *See* 42 U.S.C. §§ 12181-12189 (2004).

impairments.

There is currently a circuit split concerning the ADA's accommodation obligation as applied to employees "regarded as" having a disability.[4] The circuits not requiring reasonable accommodations for individuals "regarded as" disabled base their reasoning in part on the idea that requiring reasonable accommodations for these individuals would lead to "bizarre results" that counter the intent behind the ADA.[5] Other courts have reasoned that because the ADA requires reasonable accommodation, applying the reasonable accommodation follows the intent and purpose of the statute.[6] This comment

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[4] *Compare* D'Angelo v. ConAgra Foods, Inc., 422 F.3d 1220, 1239 (11th Cir. 2005) (holding that "regarded as" disabled individuals are entitled to reasonable accommodation), Kelly v. Metallics W., Inc., 410 F.3d 670, 676 (10th Cir. 2005) (holding that "regarded as" disabled individuals must receive reasonable accommodation), Williams v. Phila. Hous. Auth. Police Dep't, 380 F.3d 751, 776 (3d Cir. 2004) (holding that persons that are "regarded as" disabled are entitled to accommodation obligation), *and* Katz v. City Metal Co., Inc., 87 F.3d 26, 33 (1st Cir. 1996) (stating in dicta that persons that "regarded as" disabled are entitled to accommodation obligation) *with* Kaplan v. City of N. Las Vegas, 323 F.3d 1226, 1232 (9th Cir. 2003) (holding that persons "regarded as" disabled are not entitled to accommodation obligation), Workman v. Frito-Lay, Inc., 165 F.3d 460, 467 (6th Cir. 1999) (stating in dicta that persons "regarded as" disabled are not entitled to reasonable accommodation), Weber v. Strippit, Inc., 186 F.3d 907, 916 (8th Cir. 1999) (holding that persons "regarded as" disabled are not entitled to accommodation obligation), *and* Newberry v. E. Tex. State Univ., 161 F.3d 276, 280 (5th Cir. 1998) (stating in dicta that "an employer need not provide reasonable accommodation to an employee who does not suffer from a substantially limiting impairment merely because the employer thinks the employee has such and impairment"). The Second and Seventh Circuit have addressed the application of "regarded as" disabled protection under the ADA but have not directly addressed whether individuals that are "regarded as" disabled should receive reasonable accommodation. Cameron v. Cmty. Aid For Retarded Children, Inc., 335 F.3d 60, 64 (2d Cir. 2003); Mack v. Great Dane Trailers, 308 F.3d 776, 783 n.2 (7th Cir. 2002).

[5] *See Kaplan*, 323 F.3d at 1232 (agreeing with the analysis in Weber and stating that "[i]f we were to conclude that 'regarded as' plaintiffs are entitled to reasonable accommodation, impaired employees would be better off under the statute if their employers treated them as disabled even if they were not"); *Weber*, 186 F.3d at 916 (stating that "[i]mposing liability on employers who fail to accommodate non-disabled employees who are simply "regarded as" disabled would lead to bizarre results").

[6] *See D'Angelo.*, 422 F.3d at 1239 ("Based on the text of this statute and the absence of any contrary expression of congressional intent, we hold that an individual falling within the 'regarded as' category of disability under the ADA is

will explore the reasoning and analysis behind the circuits' decisions, the plain meaning of the ADA's text, the legislative history, and the United States Supreme Court's interpretation of the Rehabilitation Act and its correlation with the ADA. Ultimately, this comment will argue that applying the accommodation obligation to "regarded as" disabled individuals does not necessarily lead to bizarre results and should be enforced under the ADA.

II. THE MEANING OF "REGARDED AS" DISABLED AND "REASONABLE ACCOMMODATION"

In order to determine if individuals "regarded as" disabled should receive reasonable accommodation, one must understand the ADA's terminology. The ADA protects qualified individuals with disabilities from employment discrimination.[7] A "qualified individual with a disability" is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[8] Under the ADA, "disability" is "a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; *or being regarded as having such an impairment*."[9]

Notice that the definition of "qualified individuals with a disability" provides for reasonable accommodation for "individuals with a disability." This definition does not distinguish between the different prongs of the disability definition, and it

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entitled to a reasonable accommodation no less than an individual satisfying the actual impairment definition of disability."); *Kelly,* 410 F.3d at 676 ("We conclude that an employer must reasonably accommodate employees regarded or perceived as disabled."); *Williams,* 380 F.3d at 776 (stating that "we perceive no basis for an across-the-board refusal to apply the ADA in accordance with the plain meaning of its text"); *Katz,* 87 F.3d at 33 (stating that "both the language and the policy of the statute seem to us to offer protection as well to one who is not substantially disabled or even disabled at all but is wrongly perceived to be so").

[7] 42 U.S.C. § 12112 (a) (2004).

[8] 42 U.S.C. § 12111(8) (2004).

[9] 42 U.S.C. § 12102(2)(A)-(C) (2004) (emphasis added).

clearly does not preclude applicability to the "regarded as" prong. Read together, the clear definitional language provides that individuals "regarded as" disabled are entitled to reasonable accommodation.

The definition of "regarded as" disabled under the ADA has been addressed by the Equal Employment Opportunity Commission (EEOC) regulations which state that "regarded as" having an impairment means:

> (1) [h]as a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation; (2) [h]as a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (3) [h]as none of the impairments defined [under physical or mental impairment] but is treated by a covered entity as having a substantially limiting impairment.[10]

Also, the ADA defines "reasonable accommodation" by stating that:

> [t]he term "reasonable accommodation" *may* include—
> (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.[11]

Although the ADA definition gives examples of what constitutes a reasonable accommodation, the list is not exhaustive and does not limit its applicability to certain disabilities.

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[10] 29 C.F.R. § 1630.2(l)(1)-(3) (2004)

[11] 42 U.S.C. § 12111(9) (2004) (emphasis added).

III. Appellate Decisions Addressing Reasonable Accommodations for Those "Regarded As" Disabled

A. Anti-accommodation for employees "regarded as" disabled

Several circuits have taken the position that reasonable accommodations are not required for individuals who are "regarded as" disabled. The Fifth, Sixth, Eighth and Ninth Circuits have addressed reasonable accommodation for individuals and have each held or stated in dicta that the ADA accommodation obligation does not apply to individuals "regarded as" disabled under the ADA.[12] The Fifth and Sixth Circuits cursorily addressed this issue while the Eighth and Ninth Circuits performed a more thorough analysis of this issue.

After discussion, the Eighth Circuit in *Weber v. Strippit, Inc.*[13] held that reasonable accommodation should not be given to individuals who are "regarded as" disabled.[14] Weber suffered from a heart attack and was unable to relocate for six months.[15] Weber requested that his employer delay his transfer six months, but Strippit refused to wait and fired him.[16]

At trial, the jury found for Strippit on the perceived disability claim, and Weber appealed the district court's failure to give a "reasonable accommodation" jury instruction for the perceived disability.[17] The circuit court determined that it was proper not to require reasonable accommodation for perceived disabilities because it would lead to "bizarre results."[18]

The court held that reasonable accommodation did not apply to individuals perceived or "regarded as" disabled because it led to a disparity in treatment for persons who were impaired but not disabled under the ADA and persons who

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[12] Kaplan v. City of N. Las Vegas, 323 F.3d 1226, 1233 (9th Cir. 2003); Workman v. Frito-Lay Inc., 165 F.3d 460, 467 (6th Cir. 1999); Weber v. Strippit, Inc., 186 F.3d 907, 917 (8th Cir. 1999); Newberry v. E. Tex. State Univ., 161 F.3d 276, 280 (5th Cir. 1998).

[13] *Weber*, 186 F.3d at 907.

[14] *Id.* at 915-17.

[15] *Id.* at 910.

[16] *Id.*

[17] *Id.* at 910-11.

[18] *Id.* at 916.

were not disabled but were perceived to be and fell into the "regarded as" prong of the definition of disability.[19] The court argued that Congress did not intend to accommodate unimpaired persons who are "regarded as" disabled, but deny accommodation to impaired individuals who do not qualify as disabled under the first and second prongs of the disability definition.[20]

In *Kaplan v. City of North Las Vegas*,[21] the Ninth Circuit agreed with the Eighth Circuit's holding in *Weber* and followed a similar analysis which focused on the windfall that would be granted unimpaired individuals.[22] Kaplan was a peace officer employed by North Las Vegas City who injured his hand in a training exercise.[23] Kaplan's slow recovery was incorrectly diagnosed as a product of rheumatoid arthritis.[24] By the time this diagnosis was corrected, the City had already discharged Kaplan because they believed that it was a permanent condition.[25] Kaplan lost his ADA claim in district court because he was not a "qualified individual."[26] On appeal, the Ninth Circuit held that "regarded as" disabled plaintiffs do not have the right to reasonable accommodation.[27]

The Fifth Circuit in *Newberry v. East Texas State University*[28] cursorily addressed the issue of reasonable accommodation for individuals "regarded as" disabled.[29] While discussing

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[19] *Id.* at 917.

[20] *Id.* The court also held that failure to give jury instructions for reasonable accommodation was not an error. *Id.*

[21] Kaplan v. City of North Las Vegas, 323 F.3d 1226, 1232 (9th Cir. 2003).

[22] *Id.* at 1232-33. The court stated that

"[w]ere we to entitle "regarded as" employees to reasonable accommodation, it would do nothing to encourage those employees to educate employers of their capabilities, and do nothing to encourage the employers to see their employees' talents clearly, instead, it would improvidently provide those employees a windfall if they perpetuated their employers' misperception of a disability." *Id.* at 1232.

[23] *Id.* at 1227.

[24] *Id.*

[25] *Id.*

[26] *Id.* at 1229.

[27] *Id.* at 1232-33. Additionally, the court recognized that this was a difficult issue to address because the text of the statute. *Id.*

[28] Newberry v. E. Tex. State Univ., 161 F.3d 276 (5th Cir. 1998).

[29] *Id.* at 279-80. The court upheld the jury verdict for the employer and held

the application of the "regarded as" prong to the dismissal of a mentally disabled professor, the court stated "an employer need not provide reasonable accommodation to an employee who does not suffer from a substantially limiting impairment merely because the employer thinks the employee has such an impairment."[30]

In *Workman v. Frito-Lay*,[31] the Sixth Circuit upheld a jury verdict for a woman who suffered from irritable bowel syndrome and was fired from her job.[32] While the court discussed the application of the "regarded as" prong of the ADA's disability definition, the Sixth Circuit stated in dicta that "[u]nder the third prong, 'regarded as' having a disability, the defendant correctly contends that a finding on this basis would obviate the Company's obligation to reasonably accommodate Workman."[33]

B. Pro-accommodation for employees "regarded as" disabled

An equal number of circuits have taken the position that reasonable accommodation *should* be applied to those individuals "regarded as" disabled. The First, Third, Tenth, and Eleventh Circuits have all addressed this issue.[34] The First Circuit

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that including the "regarded as" portion of the definition in the jury instruction would not have affected the jury verdict. *Id.* The court also held that if a person is dismissed based on his conduct, even if the employer believes that the conduct is a symptom of his disability, the employer can validly dismiss the employee based on the conduct itself, "as long as the collateral assessment of disability plays no role in the decision to dismiss." *Id.* at 280.

[30] *Id.* at 280.

[31] Workman v. Frito-Lay Inc., 165 F.3d 460 (6th Cir. 1999).

[32] *Id.* at 469.

[33] *Id.* at 467. The court further stated that reasonable accommodation for individuals "regarded as" disabled was not a central issue in this case because Workman was fired, not refused an accommodation. Therefore Workman had an ADA claim under the "regarded as" prong as long as she was "regarded as" disabled, dismissed from her job, and did not require a reasonable accommodation to perform her job. *Id.*

[34] D'Angelo v. ConAgra Foods, Inc., 422 F.3d 1220, 1239 (11th Cir. 2005); Kelly v. Metallics W., Inc., 410 F.3d 670, 676 (10th Cir. 2005); Williams v. Phila. Hous. Auth. Police Dep't, 380 F.3d 751, 776 (3d Cir. 2004); Katz v. City Metal Co., Inc., 87 F.3d 26, 33 (1st Cir. 1996).

did not expressly hold on this issue, but addressed the issue indirectly in dicta. However, the Third, Tenth, and Eleventh Circuits have given substantial analysis to the issue.

The Third Circuit decision, *Williams v. Philadelphia Housing Authority Police Department,*[35] gave in-depth analysis concerning its basis for holding that reasonable accommodation is required for individuals "regarded as" disabled.[36] *Williams* involved a police officer for the Philadelphia Housing Authority (PHA) suspended without pay and ordered to undergo a psychological examination due to a confrontation with a superior.[37] The psychological evaluation determined that Williams suffered from depression and should not carry a firearm for three months, until after a reevaluation.[38] Williams asked to return to the training unit or the radio room without a gun, but PHA denied his requests for accommodations.[39]

The court determined that the plain language of the ADA, the legislative history behind the ADA, and the Supreme Court's decision in *Board of Nassau County v. Arline* demonstrated that reasonable accommodation should be afforded to individuals "regarded as" disabled.[40] The court further stated that reasonable accommodation for those "regarded as" disabled involved the employer at least, "seeking to determine in good faith the extent of the employee's actual limitations."[41]

Included in the court's analysis of these issues was a re-

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[35] Williams v. Phila. Hous. Auth. Police Dep't, 380 F.3d 751 (3d Cir. 2004).

[36] *Id.* at 773-76

[37] *Id.* at 756.

[38] *Id.* at 757.

[39] *Id.*

[40] *Id.* at 773-75. The court stated that:

> Williams was specifically denied such an assignment because of the erroneous perception of his disability. The employee whose limitations are perceived accurately gets to wok, while Williams is sent home unpaid. This is precisely the type of discrimination the "regarded as" prong literally protects from, as confirmed by the Supreme Court's decision in *Arline* and the legislative history of the ADA. Accordingly, Williams, to the extent PHA regarded him as disabled, was entitled to reasonable accommodation.

Id. at 775-76.

[41] *Id.* at 776 n.19.

sponse to the *Weber* and *Kaplan* arguments that reasonable accommodation for "regarded as" disabled would lead to "bizarre results" and windfalls to non-disabled individuals.[42] The court acknowledged the possibility for bizarre results, but held that the plain meaning of the text of the statute required reasonable accommodation to be applied in these cases.[43] The court reversed the summary judgment for PHA concerning Williams' ADA claims and remanded.[44]

The Tenth Circuit in *Kelly v. Metallics West, Inc.*[45] followed the reasoning of the First and Third Circuits in requiring reasonable accommodation for individuals "regarded as" disabled.[46] While working for Metallics West, Kelly suffered from a pulmonary embolism in her lung and required temporary supplemental oxygen in order to work.[47] Metallics West refused to allow her to bring the necessary supplemental oxygen to work.[48] Although the district court determined that Kelly was not actually disabled under the ADA because the use of oxygen mitigated her condition,[49] it allowed her "regarded as" claim to go forward.[50] The district court held that Metallics West had violated the ADA by failing to reasonably accommodate her and by terminating her based on her request for reasonable accommodation.[51]

The Court of Appeals affirmed the district court's holding and held that reasonable accommodation was required for individuals "regarded as" disabled. The basis of its decision was the plain meaning of "reasonable accommodation" under the ADA, which does not distinguish between the application to individuals actually disabled and those "regarded as" disabled.[52] The

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[42] *Id.* at 773-74.
[43] *Id.* at 774.
[44] *Id.* at 776.
[45] Kelly v. Metallics W. Inc., 410 F.3d 670 (10th Cir. 2005).
[46] *Id.* at 676.
[47] *Id.* at 672.
[48] *Id.*
[49] *Id.* at 673.
[50] *Id.*
[51] *Id.* at 671.
[52] *Id.* at 676.

court used the "reasonable accommodation" definition to demonstrate the intent of Congress to require reasonable accommodation in these circumstances, and the court also used this definition to refute the claims of "bizarre results" that are the basis of the *Kaplan* and *Weber* decisions.[53]

The Eleventh Circuit in *D'Angelo v. ConAgra Foods, Inc.*[54] followed the Third Circuit's reasoning and held that reasonable accommodation was required for individuals "regarded as" disabled.[55] D'Angelo suffered from vertigo and could not do tasks that required her to look directly at a conveyor belt.[56] She asked for an accommodation, but she was fired.[57] D'Angelo claimed both that she had an actual disability and also was "regarded as" having a disability.[58]

The Court of Appeals analyzed the application of reasonable accommodation to individuals who are "regarded as" disabled and reversed the district court to hold that accommodations were required.[59] The main focus of the analysis was the plain meaning of the ADA.[60] The court also used the relationship between the ADA and the Rehabilitation Act, Supreme Court interpretations of the Rehabilitation Act in *School Board of Nassau County v. Arline*, and Supreme Court interpretations of the ADA in *Bragdon v. Abbott* to support its argument.[61] In a very persuasive argument, the court opined that the Eighth and Ninth Circuits' decisions in this area, which held that reasonable accommodation was not required for "regarded as" disabled individuals, were incorrect because they did not en-

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[53] *Id.* at 675-76.

[54] D'Angelo v. ConAgra Foods, Inc., 422 F.3d 1220 (11th Cir. 2005).

[55] *Id.* at 1239.

[56] *Id.* at 1223.

[57] *Id.* at 1223-24.

[58] *Id.* at 1224.

[59] *Id.* at 1235.

[60] *Id.* at 1235-36.

[61] *Id.* at 1235-37. "Since the Rehabilitation Act required employers to accommodate employees who were disabled in the regarded-as sense, we can find no principled basis for concluding that the more expansive ADA does not. At all events, the plain language of the ADA yields this conclusion." *Id.*

force the plain meaning of the statute.[62] The court went further to state that applying the statute as written does not go against the intent behind the ADA, and that none of the circuits have given any evidence to support that requiring reasonable accommodation is contrary to Congress' intent.[63]

The First Circuit in *Katz v. City Metal Co.*[64] did not specifically decide whether reasonable accommodation was required for individuals "regarded as" disabled, but it did address the issue indirectly.[65] The plaintiff in *Katz* had a heart attack and could not work as a salesman due to difficulty breathing and walking while recovering.[66] His employer told him not to concern himself with clients and only worry about getting well.[67] About a month after the heart attack, Katz was fired.[68] Katz volunteered to accept a reduction in salary or any accommodation that would make it possible for him to continue to work, but his employer did not accept his offer.[69]

During the Court of Appeals' analysis of a claimed jury instruction error by the district court, the court applied the reasonable accommodation requirement to Katz in the context of his being "regarded as" disabled.[70] The court decided that based on the language and the policy behind the ADA, protection under the ADA extended to an individual who "is not substantially disabled or even disabled at all but is wrongly perceived to be so."[71] The court held that the reasonable accommodation requirement for actual disabilities applied for persons who are perceived as disabled and determined that the rejec-

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[62] *Id.* at 1238.

[63] *Id.* at 1239. The court stated that "the ADA's language is unambiguous, and none of the courts to depart from its plain meaning have pointed to anything – congressional findings, legislative history, or other materials – suggesting that the so-called 'bizarre' results yielded by a faithful reading of the ADA are contrary to Congress' plainly expressed intent." *Id.*

[64] Katz v. City Metal Co., Inc., 87 F.3d 26 (1st Cir. 1996).

[65] *Id.* at 33.

[66] *Id.* at 28-29.

[67] *Id.* at 29.

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.*

tion of the proposed accommodations by Katz, along with several other factors, was sufficient to reverse and remand the case for a new trial under "any or all of the three theories of disability available under the statute."[72]

After examining these four decisions, it is interesting to note that *Katz* was the first appellate case to address this issue,[73] and *D'Angelo* is the most recent.[74] Both of these cases came to the conclusion that reasonable accommodation is required for individuals "regarded as" disabled.[75] This seems to demonstrate that the opinion of the court in *Katz* still has great significance, and the more recent *Williams*, *Kelly*, and *D'Angelo* decisions reinvigorate the debate over whether reasonable accommodation is required in this situation.

IV. Why Reasonable Accommodation Should Apply to Individuals "Regarded As" Disabled

The main argument against reasonable accommodation for individuals "regarded as" disabled was that Congress could not have intended to deny reasonable accommodation to an impaired individual that is not substantially limited in a major life activity while requiring the same individual to receive reasonable accommodation simply if their employers regarded their impairment as substantially limiting a major life activity.[76] As the courts in *Williams* and *D'Angelo* state, there may

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[72] *Id.* at 34.

[73] *Katz* was decided on July 2, 1996. Katz v. City Metal Co, Inc., 87 F.3d 26 (1st Cir. 1996).

[74] *D'Angelo* was decided on August 30, 2005. D'Angelo v. ConAgra Foods, Inc., 422 F.3d 1220 (11th Cir. 2005).

[75] *D'Angelo*, 422 F.3d at 1239; *Katz*, 87 F.3d at 33.

[76] *Weber*, 186 F.3d at 916-17; *see also Kaplan*, 323 F.3d at 1232. The court in *Weber* gave an example of this "bizarre" situation with the following hypothetical:

> Assume, for instance, that Weber's heart condition prevented him from relocating to Akron but did not substantially limit any major life activity. Absent a perceived disability, defendants could terminate Weber without exposing themselves to liability under the ADA. If the hypothetical is altered, however, such that defendants mistakenly perceive Weber's heart condition as substantially limiting one or more major life activities, defendants would be required to reasonably accommodate Weber's condi-

be instances where the application of reasonable accommodation to "regarded as" individuals could lead to bizarre results, but occurrence of some bizarre results should not completely bar the option of reasonable accommodation for all persons "regarded as" disabled.[77] Based on the legislative history, the plain meaning of the text, and the Supreme Court's interpretation of the Rehabilitation Act, which serves as a guideline for the interpretation of the ADA, there is a strong argument that the ADA's intent was to offer protection and reasonable accommodation to individuals "regarded as" disabled.

A. Plain Meaning of Text

The text of the ADA shows that the definition of "disabled" does not differentiate between the three different categories of qualifying disabilities.[78] Additionally, the definition of a "qualified individual with a disability" and the definition of "reasonable accommodation" under the ADA do not state any difference between the categories of disability in the application of reasonable accommodation.[79] If Congress intended not to accommodate individuals "regarded as" disabled, it would or

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> tion by, for instance, delaying his relocation to Akron. Although Weber's impairment is no more severe in this example than in the first, Weber would not be entitled to accommodations for a non-disabling impairment that no similarly situated employees would enjoy.

Weber, 186 F.3d at 916.

[77] *Williams*, 380 F.3d at 774; *see also D'Angelo*, 422 F.3d at 1239.

[78] The statute plainly states that "[t]he term 'disability' means, with respect to an individual—(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being "regarded as" having such an impairment." *Id.*

[79] 42 U.S.C. 12111(8) (2004). The statute states that "[t]he term 'qualified individual with a disability' means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." *Id.* The term "reasonable accommodation" *may* include—(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities. 42 U.S.C. 12111(9) (2004) (emphasis added).

should have made a distinction within the text to address the application of reasonable accommodations.[80]

Not only did the pro-accommodation circuits agree that the text demonstrates the proper application of reasonable accommodation to all qualifying disabilities,[81] but anti-accommodation circuits also recognized that there was a discrepancy in their interpretation of reasonable accommodation and the plain meaning of the text.[82] Therefore, there is a strong argument that the interpretation of the statute based on plain meaning of the text would support a pro-accommodation application for individuals "regarded as" disabled. Several circuits have also recognized and used this argument in holding that reasonable accommodation applies to individuals "regarded as" disabled.[83]

B. Legislative History

Application of the accommodation obligation to the "regarded as" prong of the disability definition is further supported by the ADA's legislative history. The House Judiciary Committee Report demonstrates that the intent of the "regarded as" portion of the ADA's disability definition is to "cover persons who are treated by a covered entity as having a physical or mental impairment that substantially limits a major life activity. It applies whether or not a person has an impairment, if that person was treated as if he or she had an impairment."[84] Additionally, the Senate Committee on Labor and Human Resources Report reiterated the Supreme Court's opinion in *School Board of Nassau County v. Arline*,[85] which dealt with the ap-

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[80] *See* Bouie v. City of Columbia, 378 U.S. 347 (1964) ("To determine that a case is within the intention of a statute, its language must authorise [sic] us to say so."); *see also* Aaron v. Sec. and Exch. Comm'n, 446 U.S. 680, 700 (1980) ("In the absence of a conflict between reasonably plain meaning and legislative history, the words of the statute must prevail.").

[81] *See D'Angelo*, 422 F.3d at 1235-36; *Kelly*, 410 F.3d at 675; *Williams*, 380 F.3d at 774; *Katz*, 87 F.3d at 33.

[82] *See Kaplan*, 323 F.3d at 1232; *Weber*, 186 F.3d at 916.

[83] *See supra* note 6 and accompanying text.

[84] H. REP. NO. 101-485 (III) at 29 (1990).

[85] Sch. Bd. of Nassau County v. Arline, 480 U.S. 273 (1987).

plication of reasonable accommodation to the "regarded as" prong of the Rehabilitation Act, and stated that the purpose of the "regarded as" prong is to "protect individuals who have impairments that do not in fact substantially limit their functioning."[86] These excerpts demonstrate that an actual impairment is not needed for an individual to seek redress and relief from being "regarded as" disabled.

The House Judiciary Committee Report stated that the role of the "regarded as" prong is to ensure that persons are not kept from getting jobs, keeping jobs, or getting served because of their employers' ignorance of their condition or a fear of negative reactions.[87] The Senate Committee on Labor and Human Resources Report also noted that the "key element" of being "regarded as" disabled is the employer's perception of the claimant's condition.[88] In sum, the House Judiciary Committee stated that "a person who is rejected from a job because of the myths, fears and stereotypes associated with disabilities would be covered under this third test, whether or not the employer's perception was shared by others in the field and whether or not the person's physical or mental condition would be considered a disability under the first or second part of the definition."[89] This demonstrates that one purpose of the ADA is to fight misperceptions and stereotypes that are associated with disabilities. It also simply states that individuals "regarded as" disabled are in a different, but equally protected category than those who are actually disabled or have a record of a disability.[90]

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[86] S. REP. NO. 101-116 at 23 (1989).

[87] H. REP. NO. 101-485 (III) at 30 (1990).

[88] S. REP. NO. 101-116 at 30 (1989).

[89] H. REP. NO. 101-485 (III) at 30 (1990).

[90] The court in *D'Angelo* also recognized this distinction by stating that

> [I]nsofar as the ADA will sometimes entitle one employee with a particular impairment to an accommodation while not entitling another with the same impairment to the same accommodation, it is because these individuals are not similarly situated: the employee entitled to statutory protection will have suffered some wrongful adverse employment action that the other employee has not.

D'Angelo, 422 F.3d at 1239.

Even though the House Committee on Energy and Commerce Report recognized difficulties such as vagueness and uncertainty regarding the application of the reasonable accommodation and other aspects to the "regarded as" prong,[91] the legislative history specifically states that Congress intended to protect individuals who were "regarded as" disabled whether they were actually disabled or not. Therefore, the legislative history adds support to the argument that reasonable accommodation should be allowed for individuals "regarded as" disabled.

C. The Supreme Court's Application of the Rehabilitation Act in Arline

Since Section 504 of the Rehabilitation Act is only applicable to entities receiving federal funds, Congress considered the ADA as an extension of the Rehabilitation Act into the private sector, and therefore patterned the ADA after the Rehabilitation Act.[92] Section 504 of the Rehabilitation Act states that:

> [n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.[93]

The relationship between the Rehabilitation Act and the ADA is also demonstrated by the ADA's definition of disability, including the "regarded as" prong, which was taken from the Rehabilitation Act.[94] The Supreme Court addressed the corre-

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[91] H.R. Rep. No. 101-485(IV) at 82 (1990).

[92] Chai R. Feldblum, *Definition of Disability Under Federal Anti-discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 BERKELEY J. EMP. & LAB. L. 91, 98 n.48 (2000).

[93] 29 U.S.C. § 749 (2004). This statute is commonly referred to as "Section 504." Feldblum, *supra* note 92.

[94] Feldblum, *supra* note 92, at 92. According to the Rehabilitation Act of 1973, an individual with a disability is any person who "(i) has a physical or mental

lation between the Rehabilitation Act and the ADA in *Bragdon v. Abbott* by reiterating the ADA's internal requirement that ADA standards were meant to meet those of the Rehabilitation Act and its regulations at a minimum.[95] Therefore, cases that involve the Rehabilitation Act are useful in determining the proper application of the ADA and have been used as guidelines for interpreting the ADA.[96] The Supreme Court addressed the application of the Rehabilitation Act and the application of reasonable accommodation to individuals "regarded as" disabled in *School Board of Nassau County v. Arline*.[97]

In *School Board of Nassau County v. Arline*, the Supreme Court stated that under the Rehabilitation Act of 1973, reasonable accommodation should be applied for handicapped individuals, which includes individuals "regarded as" disabled.[98] *Arline* involved a teacher who was discharged from her job due to the contagious nature of her recurring tuberculosis.[99] The school board argued that Arline was not discharged because of her physical impairment, but because of "the threat . . . posed to the health of others."[100]

The Court stated that this sort of discrimination, based on the contagious nature of her condition, fell under the "regarded

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impairment which substantially limits one or more of such person's major life activities; (ii) has a record of such an impairment; or (iii) is "regarded as" having such an impairment." 29 U.S.C. § 705(20)(B)(i)-(iii) (2004).

[95] Bragdon v. Abbott, 524 U.S. 624, 631-32 (1998) (citing 42 U.S.C. § 12201(a)). The statute 42 U.S.C. § 12201(a) states that "Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. § 790 et seq.) or the regulations issued by Federal agencies pursuant to such title."

[96] Michael Waterstone, *Let's Be Reasonable Here: Why the ADA Will Not Ruin Professional Sports*, 2000 B.Y.U. L. REV. 1489, 1496, 1497 & n.42 (2000) (citing Andrews v. Ohio, 104 F.3d 803, 807 (6th Cir. 1997); McPherson v. Mich. High Sch. Ass'n, 119 F.3d 453 (6th Cir. 1997); Burns v. Columbus, 91 F.3d 836, 842 (6th Cir. 1996), Monette v. Elec. Data Sys. Corp., 90 F.3d 1173, 1177 (6th Cir. 1996; Pottgen v. Mo. St. High Sch. Activities Ass'n, 40 F.3d 926, 930 (8th Cir. 1994)) as examples of cases that apply Rehabilitation Act concepts to ADA cases).

[97] Sch. Bd. of Nassau County v. Arline, 480 U.S. 273, 289 (1987).

[98] *Id.* at 289 n.19.

[99] *Id.* at 277.

[100] *Id.* at 281.

as" portion of the definition of handicapped under the Rehabilitation Act.[101] The Court further stated that the health risk associated with some contagious diseases is not a basis to exclude all persons with contagious diseases from protection under the Rehabilitation Act, and that Congress intended to protect individuals from the discrimination based on myths associated with certain conditions.[102] The Court recognized the employers' affirmative obligation for reasonable accommodation for handicapped individuals and remanded the case to determine whether Arline could have been reasonably accommodated and whether she was contagious at the time of the discharge.[103]

The Supreme Court's decision in *Arline* strengthens the argument that reasonable accommodation should apply for the ADA as well as for the Rehabilitation Act. Even the ADA's legislative history recognizes that the intent of the ADA's "regarded as" prong was to follow the Supreme Court's holdings in *Arline*.[104] The Supreme Court's application of reasonable accommodation to individuals "regarded as" disabled under the Rehabilitation Act should correlate to a reasonable accommodation for "regarded as" disabled individuals under the ADA. This was recognized by the Third Circuit in *Williams* and by the Eleventh Circuit in *D'Angelo*, but the Fifth, Sixth, Eighth and Ninth Circuits failed to mention or address the Supreme Court's holding in *Arline* in their analyses.[105]

V. Why Reasonable Accommodation Does Not Necessarily Lead to Bizarre Results for Individuals "Regarded As" Disabled

It is possible for "bizarre" results to occur in the application of reasonable accommodation to the "regarded as" prong of the disability definition.[106] However, the vast majority of the

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[101] *Id.* at 282.
[102] *Id.* at 285.
[103] *Id.* at 289 & n.19.
[104] *See supra* note 86 and accompanying text.
[105] *Williams*, 380 F.3d at 775; *see also D'Angelo*, 422 F.3d at 1236-37.
[106] *Weber*, 186 F.3d at 916; *Kaplan*, 323 F.3d at 1232; *Williams*, 380 F.3d at

cases will not lead to "bizarre" results,[107]and there is "no basis for an across-the-board refusal to apply the ADA in accordance with the plain meaning of the text."[108] Reasonable accommodation should apply to the "regarded as" prong of the disability definition because it was Congress's intent to offer protection from disability discrimination to individuals "regarded as" disabled, and part of this protection includes an allowance for reasonable accommodation.[109]

The court in *D'Angelo* recognized that

> the ADA defines individuals with impairments that do not substantially limit their ability to perform a major life activity, but that are nonetheless treated by the individual's employer as constituting such a limitation, as *disabled*. The so-called 'regarded as' plaintiffs are *not* 'impaired but non-disabled' individuals, but rather *are disabled* within the meaning of the statute.[110]

A "qualified individual with a disability" is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[111] Therefore, the ADA should be read to give full protection to qualified individuals that are "disabled" under the ADA, including the class of individuals that are "disabled" by the myths and stereotypes that are associated with disabilities. This full protection includes the requirement of reasonable accommodation for individuals "regarded as" disabled. Also, courts should enforce the law as Congress intended, demonstrated by the plain meaning of the text, legislative history and the Supreme Court's decision in *Arline*. The Supreme Court in *United States v. Ron Pair Enterprises, Inc.,* stated that "[t]he plain meaning of legislation

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[107] *Williams*, 380 F.3d at 774.

[108] *Id.*

[109] 42 U.S.C. § 12111(8) (2004) (giving definition of "qualified individual with a disability").

[110] *D'Angelo*, 422 F.3d at 1238.

[111] 42 U.S.C. § 12111(8) (2004).

should be conclusive, except in the 'rare cases' in which the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters."[112] Applying reasonable accommodation to individuals "regarded as" disabled is not "demonstrably at odds with the intentions of its drafters." In fact, it is in line with the intent of Congress as demonstrated earlier in this comment. Therefore, the anti-accommodation circuits' analyses, which state that Congress could not have intended reasonable accommodation for individuals "regarded as" disabled, is flawed.

In *Tennessee Valley Authority v. Hill* the Supreme Court stated that:

> Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto. . . . [I]n our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with "common sense and the public weal." Our Constitution vests such responsibilities in the political branches.[113]

By not requiring reasonable accommodation for individuals "regarded as" disabled because of "bizarre" results, the Fifth, Sixth, Eighth and Ninth Circuits are effectively rewriting and vetoing a portion of the ADA and rejecting Congress' intent. As stated in the *D'Angelo* opinion, "[q]uite simply, [the court is] without authority to pass judgment on the wisdom of a congressional enactment."[114] Therefore, the courts should enforce the ADA as it is written and fully enforce the ADA by giving individuals "regarded as" disabled the same protection afforded other groups that are "disabled" under the ADA.

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[112] United States v. Ron Pair Enters., 489 U.S. 235, 242 (1989).

[113] Tenn. Valley Auth. v. Hill, 437 U.S. 153, 194-95 (1978); *see also D'Angelo*, 422 F.3d at 1238.

[114] *D'Angelo*, 422 F.3d at 1238.

VI. Conclusion

The ADA's purpose is to fight discrimination against the disabled including misperceptions, myths, and stereotypes that are associated with different disabilities. Congress clearly intended individuals "regarded as" disabled to receive protection against discrimination under the ADA as qualified individuals. Part of this protection is requiring that qualified individuals receive reasonable accommodation, if needed. Therefore, it is not a "bizarre" result to allow reasonable accommodation for individuals "regarded as" disabled. It is what Congress intended.

Elizabeth Mills[115]

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[115] J.D. candidate, University of Mississippi School of Law, 2006. The author sincerely thanks Professor Michael Waterstone for all of his helpful guidance and advice in writing this comment.

BOOK REVIEW

DISABILITY CIVIL RIGHTS LAW & POLICY

Elizabeth Penn[*]

I. INTRODUCTION

In the fast changing area of disability civil rights law, *Disability Civil Rights Law and Policy: Cases and Materials* is an essential casebook to keep the legal community abreast of the progressive issues in this evolving field.[1] To produce a comprehensive collection of disability rights cases and issues, Peter Blanck, Eve Hill, Charles D. Siegal and Michael Waterstone joined together to contribute their personal experiences as professors, attorneys and policy-makers to provide judges, practitioners and law students a tool for understand-

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[1] Peter Blanck, Eve Hill, Charles D. Siegal & Michael Waterstone, DISABILITY CIVIL RIGHTS LAW AND POLICY: CASES AND MATERIALS (2005). This casebook is written as an aid to the experienced, practicing legal field and also is intended to be a teaching device.

ing and enforcing the Americans with Disabilities Act (ADA).[2]

The disability civil rights movement began slowly in America, but has gained momentum in recent decades—bolstered in large part by the passage of the ADA in 1991. In the fall of 1962, Ed Roberts, a "postpolio quadriplegic," was admitted to the University of California at Berkeley.[3] That same fall, James Meredith integrated the University of Mississippi. The civil rights movement to integrate the races was, however, driven by better mobilized forces than that of the disability community,[4] and many early efforts to legislate rights for the disabled provided only limited protection;[5] comprehensive legislation was lacking in this area. Dur-

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[2] *See also* Ruth Colker, Adam Milani & Ruth P. Tucker, LAW OF DISABILITY DISCRIMINATION (5th ed. 2003); Laura Rothstein, DISABILITY LAW: CASES, MATERIALS & PROBLEMS (3d ed. 2002). Adam Milani, a law professor specializing in disability law and legal writing at Mercer University, passed away before the final printing of the fifth edition of *Law of Disability Discrimination*. Colker, *supra*, at iii. Professor Milani lived with quadriplegia from the age of 19 when he was involved in an ice hockey accident. *Id.* Just a few days before his death, he made final corrections to the manuscript. *Id.*

[3] Joseph P. Shapiro, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT 41 (1993).

[4] *Id.* Although society has recognized and dealt with a significant disabled population for over a century (a significant disability population was first recognized beginning in the Civil War era), perhaps the biggest difficulty still facing the disabled community is the paternalistic perception of the disabled. *Id.* at 60-1. "Disabled people are not like racial minorities . . . . Their problems, unlike those of racial and ethnic minorities, do not stem from *animus*, ill-will. Their problems stem simply from the fact that their bodies don't work correctly." Mary Johnson, MAKE THEM GO AWAY: CLINT EASTWOOD, CHRISTOPHER REEVE & THE CASE AGAINST DISABILITY RIGHTS 27 (2003) (emphasis in original). "People whose bodies do not function normally, *The New York Times* had reminded its readers, simply cannot expect to do everything normal people do." *Id.* at 49-50. Dr. Kenneth Lefebre, director of the Rehabilitation Institute of Chicago, stated, "I think it's important to realize that treating all disabled people as equal-with equal rights and responsibilities-is absurd . . . ." *Id.* at 121. At least one advocate expressed the view that "[o]ur progress as a nation should be able to be measured . . . by how enthusiastically it embraced, or at least accommodated, people who had traditionally been excluded." *Id.* at 16.

[5] Shapiro, *supra* note 3, at 64-5. Section 504 of the Rehabilitation Act of 1973, said to be the "first civil rights law for disabled people," made it illegal for institutions that received federal funding to discriminate against anyone solely by reason of handicap. *Id.*

ing the presidential campaign of 1988, George Bush pledged, "I'm going to do whatever it takes to make sure the disabled are included in the mainstream."[6] This "marked the first time that an American presidential nominee had acknowledged disabled people as a political force."[7] In 1991, the ADA passed both houses of Congress and was signed into law by President Bush.

The ADA is an ambitious law, designed as new policy through which to break barriers for people with disabilities. Unfortunately, enforcement of the Act has been met with confusion, litigation and restriction of the Act's provisions, as many definitions contained in the law are vague, and no effort was initially made to "explain the sweeping anti-discrimination legislation to the press."[8] Today, fifteen years after this legislation passed Congress, most of society is still in the dark in knowing how to react to and cohabitate with persons with disabilities. It has been said that the main achievement of the ADA is to require "common sense and a creative way of thinking about the way disabled people fit into the workplace and society."[9]

Disability Civil Rights Law and Policy: Cases and Materials focuses on a rights model of disability law, challenging the student and practitioner to overcome her stereotypes of persons with disabilities and understand the law as it stands in context with the change needed to achieve equality. The disability civil rights movement looks to achieve a view of people first, acknowledging disability secondly.[10] The paternalistic

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[6] Shapiro, *supra* note 3, at 124.

[7] *Id.* At least one polling firm stated that "disabled voters who had switched to Bush had constituted up to one-half of the four million difference of popular votes between Bush and Dukakis." *Id.* at 125.

[8] Johnson, *supra* note 4, at 13.

[9] Shapiro, *supra* note 3, at 116.

[10] *Id.* at 195. Recognizing that language usage shapes social perceptions and stereotypes of disability, the modern disability movement encourages references to persons with disabilities as emphasizing the person rather than the disability. Coalition for Citizens with Disabilities, *Think Ability First: A Language Guide on Disability.* For example, one should reference a person with a disability as a wheelchair-user, rather than using the outdated "wheelchair-bound" saying. *Id.*

attitude of much of society creates as much of a barrier to Americans with disabilities as do barriers of the built environment.[11] Indeed, most of society views only the most severe of disabilities as necessitating special accommodations. And, because there are relatively few disabilities at the severe end of the disability spectrum, most people hold the perception that the problem is not pervasive enough to require society to change in order to accommodate those individuals.[12] There exists, additionally, a problem of immense proportions in calculating the number of disabled persons in this country; the problem is compounded by fear of social stigma and other reasons that prevent persons from self-identifying themselves as disabled.

II. ORGANIZATION

Disability Civil Rights Law and Policy is primarily focused on the ADA. However, it also gives an historical overview of legislation leading to the ADA in addition to providing analysis of education, housing, tax and technology policy, and international law issues affecting the disability community.

The authors divide the book into twelve parts. Beginning with an historical analysis of conceptual foundations of disability, the text first presents societal views of disability and the problems posed by the "built environment."[13] The authors explore the outdated stereotypes that create barriers to employment, health care and government programs for persons with disabilities.[14] They outline the modern disability rights

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[11] Shapiro, *supra* note 3, at vii. For example, National Public Radio's John Hockenberry observed that had his fellow journalists known of his disability, he "almost certainly never would have been given such challenging assignments" and would never become the accomplished journalist he is today. *Id.* at 19.

[12] Johnson, *supra* note 4, at 33. "The fewer of them there were, the less one could rationally argue that the majority should change to accommodate them." *Id.*

[13] Blanck, *supra* note 1, at 2-3. The term "built environment" refers to public buildings and events that exclude people with disabilities by the presence of stairways or lack of sign interpreters or closed captioning, "artificially creat[ing] barriers between people with disabilities and others." *Id.*

[14] *Id.* at 3.

model which demands an equal opportunity and involvement in society.[15]

The authors next explain the limited constitutional protection afforded persons with disabilities, and ask the rhetorical question: "[i]s disability even a civil rights issue?"[16] Because the conclusion to this query is an evident yes, and because disability is not recognized as a suspect class, the reader is led to understand why comprehensive legislation is needed to ensure the civil rights of all disabled persons.[17]

The authors provide a brief overview of the ADA titles and describe for the reader background information which led to the passage of the ADA.[18] The reader is encouraged to explore the larger theme and history of the Act. By outlining the legislative history, the authors provide not only an under-

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[15] *Id.* at 3-4. The medical model views people with disabilities as in need of charity, whereas the modern disability rights model insists that government require all barriers to full citizen involvement be removed so that all citizens may participate in society and enjoy civil rights to which all citizens are entitled. *Id.*

[16] *Id.* at 6. Beginning in the 1970's, the disability civil rights movement began to demand full inclusion for persons with disabilities. *Id.* at 4-5. In 1990, with the passage of the ADA, "Congress expressly recognized the minority status of people with disabilities . . . ." *Id.* at 5. Persons with disabilities have suffered a history of discriminatory treatment in this country, and have been subjected to institutionalization simply to "segregate them from 'normal' society." Johnson, *supra* note 4, at 101. *See* Buck v. Bell, 274 U.S. 200, 205 (1927) (holding that compulsory sterilization of people with mental retardation did not violate the Equal Protection Clause); City of Cleburne, Texas v. Cleburne Living Ctr., 473 U.S. 432 (1985) (holding that persons with disabilities are afforded rational basis review).

[17] *Id.* at 22-30. The authors give brief descriptions of early statutes proceeding passage of the ADA, including the Rehabilitation Act of 1973, "the most important ADA precursor . . . ." *Id.* at 23. *Southeastern Community College v. Davis* provides the first analysis of the Court's review of the implementing agency's statutory construction. *Id.* at 31-39. *See* Se. Cmty. Coll. v. Davis, 442 U.S. 397 (1979).

[18] *Id.* at 42-46. The National Council on Disability (NCD), created by the Rehabilitation Act of 1973, first made findings that people with disabilities were being provided less chance for independence than they, as a class, were capable of, and recommended changes in various areas of public life. *Id.* The authors give an overview of the economic benefits and civil rights that were intended to be achieved through the ADA, discussing the history of the Rehabilitation Act and proceeding through legislative efforts to provide reasonable accommodations through civil rights laws. *Id.* at 40-66.

standing of the road to the ADA, but also a knowledge of the purpose of the Act that is invaluable in interpreting the Court's construction of the statute and the limited protection actually achievable under its provisions.[19]

Part Two leads into definitional issues: Who is covered under the Act? Who is regarded as disabled? What must be shown to have a record of a disability? What standards must be met for an individual to be substantially limited? What constitutes a major life activity?[20] The authors address broader areas in this section as well, such as the protection against employment retaliation and the right to freely associate. In addressing the threshold qualification requirements of Titles I and II, there is discussion of one arguable loophole in hiring requirements: it is left to the employer's judgment which functions are essential to the performance of the job.[21]

Parts Three, Four and Five give in-depth discussion of the three main titles of the ADA. For Title I-Employment, the authors present illustrations of what employment entities are covered, giving the reader a solid understanding of various applications of the Act and discussing the effect of the Act on employment benefits, hiring practices, and examinations and inquiries made within the employment context.[22] The authors

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[19] *Id.* at 51, 61-6. The authors discuss economic and civil rights benefits intended to be achieved through the ADA and consequences of the subsequent Court interpretations. *Id.*

[20] Blanck, *supra* note 1, at 67-9, 77-121. Although federal regulations do not provide a bright line for determining what constitutes a "substantial limitation," there are factors a court should consider on an individualized basis, taking into account the individual in his/her mitigated state. *Id.* at 77. The mitigation requirement, however, often presents the anomaly of a claimant being too disabled to gain employment, but not disabled enough to fall within the provisions of the Act. *Id. See* Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999); Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999); Bragdon v. Abbott, 524 U.S. 624 (1998); Toyota Motor Mfg., Kentucky, Inc. v. Williams, 534 U.S. 184 (2002).

[21] Blanck, *supra* note 1, at 147-49. *See* Albertson's, *supra* note 21.

[22] *Id.* at 157-288. The authors begin by giving definitions of covered entities, including employer and employee. *Id.* at 159-60. *See* Clackamas Gastroenterology Assocs. v. Wells, 538 U.S. 440 (2003) (construing the term employee); Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (stating that an individual does not have the right to sue a state employer for money damages under Title I). The authors include examples of temporary employment agencies, foreign appli-

go on to lay out the process of requesting, reviewing, and granting or denying a reasonable accommodation.[23]

In Part Four, the authors discuss sovereign immunity[24] and lay out the elements of a Title II claim.[25] Also within this section, the authors discuss facilities modifications and access to effective communication and public transportation.[26]

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cation, religious entities, and labor organizations. *Id.* at 197-97. The authors discuss hiring practices and "benefits and privileges of employment . . . ." *Id.* at 198. Chapter seven, examining permissible examinations and scope of inquiries used in hiring practices, distinguishes between pre and post-job offer behavior. *Id.* at 200-11. Blanck, *supra* note 1, at 215. The EEOC regulations present three categories for accommodation. *Id.* at 216. *See* US Airways, Inc. v. Barnett, 535 U.S. 391 (2002); Raytheon Co. v. Hernandez, 540 U.S. 44 (2003).

[23] *Id.* at 248-81. This text provides the procedural framework needed to understand how to apply precedent. *Id.* at 248-52. The authors set out affirmative reasons for denying reasonable accommodation. *Id.* at 252-81. *See* Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73 (2002). The casebook is supplemented by the authors' treatise on the subject, and the corresponding Section Three in the treatise discusses employment discrimination under Title I of the ADA. Peter Blanck, Eve Hill, Charles D. Siegal & Micheal Waterstone, DISABILITY CIVIL RIGHTS LAW AND POLICY 6-1 (West 2004). The authors also discuss coverage of employers under Section 504 of the Rehabilitation Act. *Id.*

[24] *Id.* at 289-337. To date, the fundamental right of access to the courts is the only recognized instance where Title II validly allows damages recovery; the Court heard oral argument in November 9, 2005, in *Goodman v. Georgia*, which will determine if monetary damages are available in the prison context. For a discussion of sovereign immunity issues, *see* Tennessee v. Lane, 541 U.S. 509 (2004); U.S. v. Georgia, 2005 WL 3112000 (US 2005) (oral argument). The authors further discuss abrogation of state sovereign immunity under the Rehabilitation Act in their treatise. Blanck, *supra* note 23 at 10-1 to 10-16. For a discussion of covered public services, *see* Pa. Dep't of Corrs. v. Yeskey, 524 U.S. 206 (1998); Barden v. City of Sacramento, 292 F.3d 1073 (9th Cir. 2002); Bledsoe v. Palm Beach County Soil & Water Conservation Dist., 133 F.3d 816 (11th Cir. 1998). *Id.* at 312-37.

[25] *Id.* at 337-410. The text discusses "qualified person with a disability." *Id.* at 337-44. *See* Pottgen v. Mo. State High Sch. Activities Ass'n, 40 F.3d 926 (8th Cir. 1994). The authors go so far as to outline what are the affirmative responsibilities of public entities under the Act. *Id.* at 344. *See* Olmstead v. Zimring, 527 U.S. 581 (1999) (discussing community inclusion); Rodde v. Bonta, 357 F.3d 988 (9th Cir. 2004); Henrietta D. v. Bloomberg, 331 F.3d 261 (2d Cir. 2003); Parker v. Universidad de Puerto Rico, 225 F.3d 1 (1st Cir. 2000) (facilities modification); Kinney v. Yerusalim, 9 F.3d 1067 (3rd Cir. 1993) (holding resurfacing streets is alteration within meaning of statutory regulation which requires city to install curb cuts). *See also* Blanck, *supra* note 1, at 373-86 (discussing circuit court cases interpreting affirmative responsibilities to provide accommodations in public arenas).

[26] Bonnie Poitras Tucker & Adam A. Milani, LAW IN A NUTSHELL: FEDERAL

The authors distinguish disparate impact from disparate treatment claims, illustrating what discrimination "by reason of such disability" has been interpreted to require.[27]

Part Five begins with definitions of what constitutes a place of public accommodation[28] and what conduct is prohibited in such areas.[29] The text supplies regulations for new construction and for modifications to existing facilities, followed by what affirmative responsibilities a public place owes its visitors.[30]

Part Six gives an outline of enforcement procedures and available remedies, separately discussing Titles I, II, and III, statutes of limitations and attorneys' fees available under the ADA.[31] The text describes the scope of the Equal Employ-

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DISABILITY LAW (3d ed. 2004). Entities are required to provide reasonable modifications if an individual would be otherwise qualified to utilize the services of that entity. *Id.* at 152-53. An individual is "otherwise qualified" if he or she meets all eligibility requirements despite his or her disabilities; a reasonable accommodation is required if an individual cannot meet the eligibility requirements and the accommodation would not fundamentally alter the nature of the business. *Id.* at 153. *See* Alexander v. Choate, 469 U.S. 287 (1985) (setting forth reasonableness standard under Section 504); PGA Tour, Inc. v. Martin, 532 U.S. 661 (2001) (stating that ADA requires individualized inquiry to determine if modification reasonable).

[27] Blanck, *supra* note 1, at 410-14.

[28] Blanck, *supra* note 1, at 415-59. *See* Neff v. Am. Dairy Queen Corp., 58 F.3d 1063 (5th Cir. 1995); Access Now Inc. v. Sw. Airlines, Co., 227 F. Supp. 2d 1312 (S.D. Fl. 2002) (construing internet to not be "place of public accommodation").

[29] *See* Johnson v. Gambrinus Co./Spoetzl Brewery, 116 F.3d 1052 (5th Cir. 1997) (denying person who is blind use of guide dog on public tour is violation of ADA); PGA Tour, Inc. v. Martin, *supra* note 26 (accommodation is reasonable when it does not "fundamentally alter nature" of business).

[30] *See* Aikins v. St. Helena Hosp., 843 F. Supp. 1329 (N.D. Cal. 1994) (discussing effective communication); Colo. Cross Disability Coal. v. Hermanson Family Ltd. P'ship I, 264 F.3d 999 (10th Cir. 2001) (discussing architectural barriers); Lieber v. Macy's W., Inc., 80 F. Supp.2d 1065 (N.D. Ca. 1999); Caruso v. Blockbuster-Sony Music Entm't Ctr., 193 F.3d 730 (3d Cir. 1999).

[31] Blanck, *supra* note 1, at 544-736. Title I allows for equitable remedies, punitive damages and attorneys' fees, but also requires administrative exhaustion before commencing private suit. *Id.* at 544-55, 607-15. Title II allows compensatory damages, injunctive relief and attorneys' fees, and does not require administrative exhaustion. *Id.* Like Title II, Title III also does not require exhaustion of administrative remedies, but its benefits are heavily weighted down by the lack of

ment Opportunity Commission's authority[32] and then analyzes individual methods of procedure and remedies under Titles I, II, and III.[33]

A short part of the book is devoted to an overview of state anti-discrimination laws.[34] The authors then expand on this

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damages provisions. *Id.* Title III limits remedies to only injunctive relief and attorneys' fees; the Attorney General is, however, given authority to seek damages under Title III. *Id.* Title III is further restricted by standing issues which are inapplicable to Titles I and II. *Id.* at 670, 675. The provisions of ADA's Title IV-Amendments to the Communications Act are set forth. *Id.* at 658-60. There are not, however, any published cases interpreting the provisions of these amendments available for the authors to analyze. *Id.* *See* Kramer v. Banc of Am. Sec., LLC, 355 F.3d 961 (7th Cir. 2004) (finding that employee may not receive punitive damages for retaliation claim). *Id.* at 686-732. *See* Soignier v. Am. Bd. of Plastic Surgery, 92 F.3d 547 (1996) (discussing statute of limitations). *See* Buchannon Bd. & Care Home, Inc. v. W. Va. Department of Health & Human Resources, 532 U.S. 598 (2001); Adkins v. Briggs & Stratton Corp., 159 F.3d 306 (7th Cir. 1998); Lanni v. New Jersey, 259 F.3d 146 (3d Cir. 2001). The text discusses taxability of attorneys' fees. Blanck, *supra* note 1, at 699-736.

[32] Blanck, *supra* note 1, at 575-83. The EEOC is not a party to arbitration agreements and therefore is not bound by the terms of such agreements or precluded from bringing suit because of the existence of such agreements. *Id.* The EEOC has dual goals-to make the individual whole and to vindicate the wrong in the public interest. *Id.* *See* EEOC v. Waffle House, Inc., 534 U.S. 279 (2002) (discussing EEOC's authority and role).

[33] Blanck, *supra* note 1, at 547-686. *See* Cannon v. Univ. of Chicago, 441 U.S. 677 (1979) (finding private right of action under Title IX of the Education Amendments of 1972 and Title VI of Civil Rights Act of 1964); Barnes v. Gorman, 536 U.S. 181 (2002) (because punitive damages are not available under Title VI, the logical conclusion follows that such damages also are not available under Title II of ADA or §504); Alexander v. Sandoval, 532 U.S. 275 (2001) (although Title VI limited to intentional discrimination, disparate impact claim is available for ADA Title II and §504); Botoson v. Paul McNally Realty, 216 F.3d 827 (9th Cir. 2000) (holding Title III does not require administrative exhaustion nor notice to any state or local agency before filing Title III action; no damages available for Title III claim). The "same enforcement procedures apply to Title IX of the Civil Rights Act, section 504 of the Rehabilitation Act, and Title II of the ADA, which all rest on Title VI of the Civil Rights Act". Blanck, *supra* note 1, at 620. For an understanding of enforcement procedures of the ADA, it is imperative for the reader to grasp the state of enforcement of anti-discrimination statutes prior to the passage of the Act. Blanck, *supra* note 1, at 634.

[34] *Id.* at 799-842. Part Seven consists of only one chapter which discusses individual state laws both before and after passage of the ADA. *Id.* at 799-842. One cited study shows that 29 states had anti-discrimination laws prior to the enactment of the ADA. *Id.* at 800. *See* Colmenares v. Braemar Country Club, Inc., 29 Cal.4th 1019 (Cal. 2003); Goldman v. Standard Ins. Co., 341 F.3d 1023

comparative analysis by providing the reader with an overview of international disability rights[35] and international human rights law,[36] analyzing treatment of this class in various countries, including Canada, South Africa and France,[37] and in regional organizations, including Asian and Pacific countries, the European Union (EU) and the Organization of American States (OAS).[38] Recognizing that international rules are in the formative stage,[39] the authors use less of a case-study approach in this section. Rather, they outline statistics of the number of people with disabilities throughout the world and discuss economic participation by persons with disabilities in various nations and various legal approaches to issues concerning disabilities-such as rights, welfare and inclusion.[40]

The text goes on to discuss the view of the United Nations (UN) towards disabilities issues.[41] The authors outline the early efforts and provide an overview of current efforts to clearly define international disability rights by establishing a Convention based on "the work done in the fields of social development, human rights and non-discrimination."[42]

(9th Cir. 2003); Reeves v. Johnson Controls World Servs., Inc., 140 F.3d 144 (2d Cir. 1998); Washburn v. Columbia Forest Prods., Inc., 104 P.3d 609 (Org. Ct. App. 2005); Chielewski v. Xermac, Inc., 580 N.W.2d 817 (Mich. 1998). *Cf.* Garcia v. Allen, 28 S.W.3d 587 (Tx. Ct. App. 2000) (example of state not expanding federal protection).

[35] Blanck, *supra* note 1, at 843-910. *See* Granovshy v. Minister of Employment & Immigration, 1 S.C.R. 703 (S.Ct. Canada 2000); Quebec (Commission Des Droits de la Personne & Des Droits de la Jeunesse) C. Montreal (Ville), 1 S.C.R. 665 (S.Ct.Canada 2000); British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights), 3 S.C.R. 868 (S.Ct.Canada 1999).

[36] Blanck, *supra* note 1, at 911-78. *See* Price v. United Kingdom, 34 Eur. Hum. R.Rep. 53 (European Ct. of Human Rights 2002) (reviewing prison cell conditions); X & Y v. The Netherlands, 8 Eur. Hum. R. Rep. 235 (European Ct. of Human Rights 1986); Botta v. Italy, 26 Eur. Hum. R. Rep. 241 (European Court of Human Rights, 1998); Autism-Europe v. France, 38 E.H.R.R. CD265 (European Committee of Social Rights, 2004) (reviewing Revised European Social Charter for non-discrimination in education of children with autism).

[37] Blanck, *supra* note 1, at 853-910.

[38] *Id.* at 916-78.

[39] *Id.* at 844.

[40] The authors' treatise on disability rights supplements the body of law available in the international arena. *See* Blanck, *supra* note 23, at 22-3 to 22-8.

[41] Blanck, *supra* note 1, at 979-96.

[42] Blanck, *supra* note 1, at 989. An Ad Hoc Committee was established by the

Part Nine presents a discussion of the relationship between disability issues in employment, welfare and health care policy.[43] Discussing the rapidly growing area of genetic testing, the authors explore EEOC regulations and the discriminatory screening practices of insurance agencies and employers.[44] Part Ten addresses areas of evolving disability rights policy where disability rights are being newly addressed, such as technology policy, accessibility to the internet[45] and the tax treatment of disability issues.[46]

Part Eleven delves into discrimination against persons with disabilities in housing and the statutory construction of the Fair Housing Act.[47] Part Twelve covers special education,

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General Assembly to consider proposals for the Convention. Adopted by the General Assembly 19 December 2001 GA Res. 56/168, UN Doc. A/RES/56/168 (2001), http://www.un.org/esa/socdev/enable/rights/adhoccom.htm (last visited May 24, 2005). Blanck, *supra* note 1, at 979-996.

[43] Blanck, *supra* note 1, at 997-1057. *See* Aughe v. Shalala, 885 F. Supp. 1428 (W.D.Wash. 1995) (dismissing case challenging TANF's age eligibility limit); Henrietta D. v. Giuliani, 1996 WL 633382 (E.D.NY 1996) (discussing class certification).

[44] *Id.* at 1058-67.

[45] *Id.* at 1073. *See* Rendon v. Valleycrest Prods., Ltd., 294 F.3d 1279 (11th Cir. 2002); Noah v. AOL Time Warner Inc., 261 F. Supp. 2d 532 (E.D.Vir. 2003); *In re* Priceline.com Inc., Att'y Gen. N.Y. Internet Bureau (Apr. 8, 2004); Martin v. Metro. Atlanta Rapid Transit Auth., 225 F. Supp. 2d 1362, (N.D.Ga. 2002). Although, "[m]ost disabled people are beginning to believe they have a right to technology," assistive technology will not be available to the majority of people with disabilities because such devices are high priced and the market does not demand a level of production to reduce cost in the foreseeable future. Shapiro, *supra* note 3, at 232-6.

[46] Blanck, *supra* note 1, at 1118-28. *See* Hubbard v. Comm'r, 86 T.C.M. (CCH) 276 (2003); Fan v. Commissioner, Tax Ct. Rep. (CCH) 54,419 (2001).

[47] Blanck, *supra* note 1, at 1129-94. *See* Mich. Prot. & Advocacy Serv., Inc. v. Babin, 18 F.3d 337 (6th Cir. 1994); City of Edmonds v. Oxford House, Inc., 514 U.S. 725 (1995) (discussing maximum occupancy requirements); Rodrigrez v. 551 W. 157th Street Owners Corp., 992 F. Supp. 385 (S.D.N.Y. 1998); U.S. v. Cal. Mobile Home Park Mgmt. Co., 29 F.3d 1413 (9th Cir. 1994); Brook v. Ineichen, 54 F.3d 425 (7th Cir. 1995); Shapiro v. Cadman Towers, Inc., 51 F.3d 328 (2d Cir. 1995); Groner v. Golden Gate Gardens Apartments, 250 F.3d 1039 (6th Cir. 2001); Oconomowoc Residential Programs, Inc. v. City of Milwaukee, 300 F.3d 775 (7th Cir. 2002); Elderhaven, Inc. v. City of Lubbock, 98 F.3d 175 (5th Cir. 1996); U.S. v. Edward Rose & Sons, 384 F.3d 258 (6th Cir. 2004) (interpreting "common area").

analyzing the Individuals with Disabilities in Education Act (IDEA).[48]

The text concludes with an appendix containing the relevant statutes discussed within the book.[49] This single binding conveniently provides the reader with quick access to the statutory authority referenced throughout the casebook.

III. DISCUSSION

One cannot escape the new issues that disability rights present to today's integrated society.[50] This newly recognized class has yet to achieve the full benefit and protection of established civil rights. However, to fully realize the goals of the ADA, greater enforcement is needed, and revised legislation is needed in some areas to increase enforceability.

While courses in employment and education antidiscrimination are helpful in understanding the civil rights concept of disability, disability law has grown to such a vast body that individualization is needed in law school course curriculum. *Disability Civil Rights Law and Policy: Cases and Materials* will be an extraordinary guide to those starting out

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[48] Blanck, *supra* note 1, at 1195-1257. The authors discuss precursors to and requirements of the IDEA. *Id.* at 1195-1206. *See* Honig v. Doe, 484 U.S. 305 (1988) (discussing disruptive conduct related to disabilities); Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883 (1984) (holding medical services exception to supportive services required under EHA to only apply when such medical services would be unduly expensive or require the expertise of a licensed physician); Bd. of Educ. v. Rowley, 458 U.S. 176 (1982) (discussing the right to a "free appropriate public education"); Sacramento City Unified Sch. Dist. v. Rachel H., 14 F.3d 1398 (9th Cir. 1994) (approving 4-factor balancing test to determine "least restrictive environment"). *See also* Colker, *supra* note 2, at 295-454 (discussing primary and secondary educational institutions and matters covering postsecondary education); Rothstein, *supra* note 2, at 465-646. The primary goal of primary and secondary institutions is integration of the classrooms, where a limiting concern in postsecondary institutions, such as professional schools, is the weight which must by given to elevated academic standards. Colker, *supra*, at 325-33, 381-405.

[49] Blanck, *supra* note 1, at 1259-13396. The statutes included within the book are: The Americans with Disabilities Act of 1990, The Civil Rights Act of 1991, The Rehabilitation Act of 1973, The Fair Housing Act, The Individuals with Disabilities Education Act. *Id.*

[50] Shapiro, *supra* note 3, at 282. "We want more disabled people, not fewer," stated the late Timothy Cook, director of the National Disability Law Center. *Id.*

and continuing to analyze issues in the disability community as its focus on procedural and policy issues educates employers on how to comply with the law and educates advocates on how to enforce its provisions.

Emerging issues regarding genetic testing, withholding or withdrawing life-sustaining support from disabled persons, stem cell research and wrongful life suits are quickly adding to the large body of disability rights law, [51]demanding casebooks to continuously be updated and supplemented. Nonetheless, such evolutions in the law obviate why the area of disability is currently an exciting field in which to practice. Indeed, after this book was sent to the publisher, there erupted the controversial allowance of the withholding of life-sustaining assistance to Terri Schiavo. Such high-profile cases bring the controversy of euthanasia and end-of-life decisions to mainstream consciousness. Several states have considered the subject, although Oregon is alone in passing such legislation.[52]

New policy issues continue to gain strength within political circles, such as recognizing a responsibility to educate and counsel newly disabled persons on quality of life improvements through new technology and assistive devices. Because much of society fosters outdated and false stereotypes of persons with disabilities, many people believe a disabled life to be not worth living or at least of less value.[53] This attitude, in

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[51] *Id.* at 272. Wrongful life suits are not necessarily a new development. *Id.* As early as 1942 there are documents supporting voluntary killing of "defective" children as a "humane alternative to letting them live." *Id.*

[52] Oregon's law is not without controversy. In fact, a third year report on the law revealed that a "startling 63% of [reported cases] cited fear of being a 'burden on family, friends or caregivers as a reason for their suicide." United States Conference of Catholic Bishops, 2001. California's laws allowing physician assisted suicide and euthanasia was defeated in 1999, Maine's attempt was defeated in 2000 and Hawaii was defeated in 2003. Marilyn Golden, *Why Assisted Suicide Must Not be Legalized*, Disability Rights Education and Defense Fund, http://www.dredf.org/assistedsuicide.html (last visited Nov. 26, 2005).

[53] A prevalent theme throughout disability casebooks is personalization of the subject of disability rights. *See supra*, note 2. Laura Rothstein begins her book, *Disability Law: Cases, Materials and Problems*, with real-life stories of persons with disabilities to personalize the subject for the reader, one of the goals of her

turn, perpetuates the belief that assisted suicide and withholding of sustenance are acceptable behaviors towards the disabled. With new state laws governing this area, this state of the law is likely to have a substantial impact on disability civil rights laws.

This casebook will continue to evolve as the field of disability law continues to grow and the disability rights movement continues to gain momentum and acceptance among the general population. Still, perhaps the most important thing to remember is that disability issues are first about "fairness and common sense" and not legal battles.[54] A great strength of this book is that it recognizes the political significance of the ADA, analyzing policy decisions and historical developments, and challenging the reader to understand what is needed to effectuate the rights that were intended to be provided by the drafters.

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text being "to sensitize students about various disabilities and to dispel myths." Laura Rothstein, DISABILITY LAW: CASES, MATERIALS & PROBLEMS 33 (Teacher Supp. 3d ed. 2002). *Law of Disability Discrimination* begins by identifying the sources of discrimination in society, including individual comfort levels, pity, stereotyping and stigma associated with certain disabilities. Colker, *supra* note 2, at 1-2. The book then identifies historic rationales for discrimination against individuals with disabilities and stereotypes perpetuated by society before discussing the statutory evolution leading to civil rights for this group. *Id.* at 12-36.

[54] Shapiro, *supra* note 3, at 336.

REFLECTIONS ON STANDING: CHALLENGES TO SEARCHES AND SEIZURES IN A HIGH TECHNOLOGY WORLD

José Felipé Anderson[*]

"Those who give up essential liberty, to purchase a temporary Safety, deserve neither Liberty nor Safety." Benjamin Franklin[1]

"Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime." Judge Learned Hand[2]

INTRODUCTION

Among the profound issues that surround constitutional criminal procedure is the obscure often overlooked issue of who has standing to challenge an illegal search, seizure or confes-

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[1] Benjamin Franklin, Reply of the Pennsylvania Assembly to the Governor (Nov. 1755), *in* POWER QUOTES 106 (Daniel B. Baker, ed., 1992).

[2] United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923).

sion.[3] Privacy interests are often overlooked because without a legal status that allows a person to complain in court, there is no way to challenge whether one is constitutionally protected from personal invasions. Standing is that procedural barrier often imposed to prevent a person in a case from objecting to improper police conduct because of his or her relationship of ownership,[4] proximity,[5] location, or interest[6] in an item searched or a thing seized.[7] Although rarely penetrating the news headlines, those who work in the day-to-day vineyards of

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[3] Standing is the manner in which litigants are allowed into the courthouse doors. The Supreme Court has made clear that for a party to qualify to litigate, it must demonstrate "first and foremost 'an invasion of a legally protected interest.'" Arizonans for Official English v. Arizona, 520 U.S. 43, 64 (1997) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)).

[4] The Supreme Court has said that privacy expectations have been explained by "a source outside the Fourth Amendment, either by reference to concepts of real or personal property law . . . ." Minnesota v. Carter, 525 U.S. 83, 88 (1998) (quoting Rakas v. Illinois, 439 U.S. 128, 143 n.12 (1978)). Thus, trespassers, for example, would have no reasonable expectation of privacy in land that they might wrongfully occupy. In *Amezquita v. Hernandez-Colon*, 518 F.2d 8, 11 (1st Cir. 1975), the First Circuit held that squatters had no reasonable expectation of privacy in structures that they constructed on government-owned land. The court explained that "[n]othing in the record suggests that the squatters' entry upon the land was sanctioned in any way by the commonwealth. . . . That fact alone makes ludicrous any claim that they had a reasonable expectation of privacy." *Id.* Such limitation in privacy protection may even apply when the initial possession of the property is sanctioned. *See* Laney v. State, 842 A.2d 773 (Md. 2004) (holding that defendant had no reasonable expectation of privacy as a holdover mortgagor in foreclosed property in which a search was performed and explosives were discovered); United States v. Rahme, 813 F.2d 459 (2d. Cir. 1987) ("[W]hen a hotel guest's rental period has expired or been lawfully terminated, the guest does not have a legitimate expectation of privacy in the hotel room . . . ."). *But see* United States v. Kitchens, 114 F.3d 29, 32 (4th Cir. 1997) (stating that privacy expectation may survive if the hotel has a practice of allowing tenants to hold over the check out time without consequence.).

[5] *See* California v. Greenwood, 486 U.S. 35 (1988) (holding that privacy interest was affected by the actual location of trash awaiting pick up outside a private residence). Rights might be affected by whether the trash is located on the private or public portion of the property.

[6] *See* United States v. Ross, 456 U.S. 798 (1982) (privacy in personal closed containers); O'Connor v. Ortega, 480 U.S. 709 (1987) (some privacy protection in the contents of private desk in a government office).

[7] *See* United States v. Barth, 26 F. Supp. 2d 929 (W.D. Tex. 1998) (discussing reasonable expectation of privacy in files stored on the hard drive of a personal computer).

the criminal justice system well know the power of this concept that often is the difference between who may complain about an egregious privacy wrong and who may not.[8] Standing is the keeper of the constitutional gate, and for defense attorneys its presence is not unlike the mythical Cerberus which guards the gates of hell[9] and will require a Herculean effort to overcome.[10]

Newsworthy stories of obviously guilty criminals going free because of the constable's blunder have often lead to cries for sometimes extreme criminal justice reform.[11] But the frequency of such rulings as compared to the political attention they receive does not accurately reflect the difficulty of a defendant prevailing on an issue where the "exclusionary rule" is actually invoked.[12] The concept of standing however plays into not only who can seek the protection of the courts, but how those laws are challenged and interpreted by trial and appellate courts.[13] The procedural doctrine acts as a constitutional gatekeeper that determines who may articulate arguments on the merits of their constitutional privacy claims. Like all procedural tools

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[8] Courts simply do not decide every dispute presented to them. Indeed, considerations of judicial efficiency would logically suggest that courts, like any institution, would desire to reduce their workload by imposing administrative tools to filter matters deemed inappropriate.

[9] Cerberus, a creature from Greek mythology, was a three headed dog that guarded the entrance to Hades. *See* ENCYCLOPEDIA BRITANNICA II READY REFERENCE 691 (1976).

[10] Hercules, another mythical figure, had to subdue Cerberus as one of his twelve labors. *See* WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1167 (2d ed. 1957).

[11] The oft noted query, whether "[t]he criminal is to go free because the constable has blundered," was formulated by Benjamin Cardozo while a judge on the New York Court of Appeals rejecting adoption of the exclusionary rule. *See* New York v. Defore, 150 N.E. 585, 586-89 (N.Y. 1926).

[12] The exclusionary rule is a judicially created doctrine that prevents evidence from being admitted into court that has been obtained in violation of a defendant's constitutional rights. It has been criticized as barring "probative evidence that the police are judged, often on the sheerest technicality, to have obtained improperly." ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE 104 (1996).

[13] *See generally* 6 WAYNE R. LAFAVE, SEARCH AND SEIZURE, § 11.3 (4th ed. 2004).

their functional value is in providing some efficiency and predictability to the system, so that courts may only resolve disputes properly before them.[14] Efficiency is an important value, but when the balance between efficiency and protecting fundamental rights tips too far toward strict adherence to process it may well be time to examine whether the rule needs to be modified.[15]

As we enter the twenty-first century with a notable increase in technology, greater concerns for security brought about by terrorist activity, most notably the tragedy of September 11, 2001, examination of the fundamental doctrine that protects our privacy is necessary.[16] Assumptions about how well those rules operate in the current climate of emerging technology, high crime, and terrorism concerns should be reexamined. We should be sure that the circumstances of a changing world do not lead to the long term application of legal principles ill-suited to the demands of a new era.[17]

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[14] *See* Mary I. Coombs, *Shared Privacy and the Fourth Amendment, or the Rights of Relationship*, 75 CAL. L. REV. 1593 (1987).

[15] *See* Melvin Gutterman, *Fourth Amendment Privacy and Standing: "Wherever the Twain Shall Meet,"* 60 N.C. L. REV. 1 (1981).

[16] The tragedy this nation experienced on September 11, 2001, resulting in the loss of 3,000 lives from terrorist activity, created a renewed desire to investigate crime before it occurs by using whatever investigative techniques might be available.

[17] The most familiar area of electronic intrusion that courts have addressed is wiretapping. But such surveillance, that is, listening in secret, is an ancient practice. As one court has recently explained:

> Eavesdropping is an ancient practice which at common law was condemned as a nuisance. At one time the eavesdropper listened by naked ear under the eaves of houses or their windows, or beyond their walls seeking out private discourse. The awkwardness and undignified manner of this method as well as its susceptibility to abuse was immediately recognized. Electricity, however, provided a better vehicle and with the advent of the telegraph surreptitious interception of messages began. As early as 1862[,] California found it necessary to prohibit the practice by statute. During the Civil War general J.E.B. Stewart is reputed to have had his own eavesdropper along with him in the field whose job it was to intercept military communications of the opposing forces. . . .
>
> The telephone brought on a new and more modern eavesdropper known as the 'wiretapper.' Interception was made by a connection with a telephone line.

The purpose of this article is to examine some fundamental principles of standing as they relate to other privacy issues. Many of these concerns have been ignored by contemporary courts as the technology that affects privacy interests has marched forward at a break-neck pace.[18] The rules of standing as currently applied will lead to unduly restrictive access to challenging government conduct effecting privacy interests.[19]

Furthermore, the standing rules as currently applied have lead to the development of faulty doctrine in the area of the exclusionary rule, which affects Fourth Amendment rights in general.[20] Opinions that are both illogical and difficult to apply have resulted from current standing rules, and both defense and prosecution interests have suffered from the poorly crafted jurisprudence that has resulted.[21] The ill-conceived jurispru-

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Kopko v. Miller, 842 A.2d 1028, 1034 (Pa. Commw. Ct. 2004) (quoting Berger v. New York, 388 U.S. 41, 45-46 (1967)).

[18] One insightful commentator has recognized that the "advent of widespread use of computer technology . . . has altered the way in which individuals view the world. . . . Today, lawyers and business professionals must be cognizant of communications law, criminal law, privacy law, and many other subjects that may not have been relevant to their situation only a decade ago." RAYMOND T. NIMMER, THE LAW OF COMPUTER TECHNOLOGY: RIGHTS, LICENSES, LIABILITIES, III-1 (2d ed. 1992).

[19] The need for courts to impose procedural rules like standing requirements is a continuing reminder that courts are functioning organizations which have their own regulatory concerns. Rules like statutes of limitations and filing deadlines serve to advance goals other than those achieved by deciding a case on its merits.

[20] The Fourth Amendment of the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend IV.

[21] *See generally* CHARLES E. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 201 (1978).

> Repealing the so called "exclusionary rule" would not make the police any more effective in their "war" against crime. Despite loud and frequent complaints, the police have not been handcuffed by the rulings of the Warren Court. Except for minor drug offenses, there is no evidence to suggest that policemen make fewer arrests, or that prosecutors secure

dence of standing will clearly continue if broader, more predictable, rules of standing are not developed to meet the challenges of our high technology age.[22] Indeed, it is my belief that the poorly reasoned and outdated Fourth Amendment precedent, combined with the rapid increase in intrusive technology, creates a dangerous lack of checks and balances in privacy protection and the public's ability to adequately respond.[23]

I propose that standing rules need to be expanded in some areas and clarified in others.[24] Specifically, in a world where video surveillance is increasingly in use,[25] it makes sense to apply liberal standing rules to those circumstances.[26] Furthermore, the concept of standing needs to be clarified as related to the seizure of items from electronic databases to insure proper development of Fourth Amendment law.[27]

Recent attempts by the federal government to assist law enforcement by relaxing requirements for investigating alleged

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> fewer convictions, because of Supreme Court decisions safeguarding the rights of the accused; on the contrary, the evidence runs the other way.

Id. at 201 (footnotes omitted).

[22] "In time, given the global movement toward democracy, interactive voice, audio, video data exchange will occur world wide. . . . In addition to fiber optics, dozens of other technological innovations will end our dependency on the electromagnetic spectrum." JONATHAN W. EMORD, FREEDOM, TECHNOLOGY AND THE FIRST AMENDMENT 308 (1991).

[23] In human terms the value of privacy is high but difficult to measure and constantly evolving. "Political, social and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society. . . . [T]he right to be let alone . . . has grown to comprise every form of possession—intangible, as well as tangible. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890).

[24] It is not my goal to make courts the clearinghouse for all personal privacy matters; rather, I suggest that courts are in the best position to evaluate new technology as it emerges.

[25] Consider, as an example of intrusion, the use of red light cameras, which has emerged over the last decade. Currently, the surveillance method is so common that we are no longer surprised by the mailed notices capturing our vehicle and often a passenger, the time of violation, and our exact location at a camera equipped intersection.

[26] As a society, if we value privacy, we should not make ourselves vulnerable to rapid technological change that will turn our privacy privilege to a right without a remedy.

[27] *See* MILLER, *infra* note 184.

terrorism under the Patriot Act[28] have brought the issue of government surveillance to the attention of an anxious nation that wants both freedom and security.[29] Indeed, Congress and the executive branch continue to struggle with what level of intrusion is necessary to insure security.[30] There has also been legislative action on the state level to address the problem of police access to high technology in investigating crime after September 11, 2001.[31] Groups calling for more concern for the protection of privacy have also raised concerns that privacy

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[28] *USA PATRIOT Act, Pub. L. No.* 107-56, 115 Stat. 272 (2001). One federal court had this comment about the law:

> The passage of the Patriot Act altered and to some degree muddied the landscape. In October 2001, Congress amended FISA [Foreign Surveillance Intelligence Act] to change "the purpose" language. . . . It also added a provision allowing "Federal Officers who conduct electronic surveillance to acquire foreign intelligence information'" to "consult with federal law enforcement officers to coordinate efforts to investigate or protect against" attack or other grave hostile acts, sabotage or international terrorism, or clandestine intelligence activities, by foreign powers or their agents.

In re: Sealed Case Nos. 02-001, 02-002, 310 F.3d 717, 728-29 (2002).

[29] *See* FIONA DOHERTY ET AL., LAWYER'S COMMITTEE FOR HUMAN RIGHTS, A YEAR OF LOSS: REEXAMINING CIVIL LIBERTIES SINCE SEPTEMBER 11, 11 (2002). The Lawyer's Committee for Human Rights has expressed a great deal of concern about changes, announced on May 30, 2002 by Attorney General John Ashcroft, concerning the FBI guidelines on criminal investigations and citizen surveillance. *Id.*

> Under the Attorney General's new guidelines, FBI agents may once again monitor and investigate lawful political and religious activities. FBI agents can now keep records of people who attend places of worship—mosques, synagogues, and churches—as well as those who attend meetings of non-governmental groups. To do this, they may covertly attend political or religious gatherings, surf internet sites, and mine commercial databases. Furthermore, they can do all of this without showing any reason to suspect any criminal activity. . . . In addition, there is no time limit on how long the information may be retained.

Id.

[30] *See generally id.* at 7-12. The USA Patriot Act was passed only a few weeks after the tragedy of September 11, 2001. Accordingly, it did not receive the normal scrutiny as if it had gone through the complete legislative process. *Id.* at 1-2.

[31] The American Civil Liberties Union has been actively involved in examining the provisions of the USA Patriot Act.

rights are being unfairly curtailed.[32]

The creation of an office of homeland security[33] and the continuing war on terrorism[34] have made citizens of the United States acutely aware that notions of privacy are being challenged in ways unknown to prior generations.[35] By clarifying the role that standing plays in the constitutional equation, we may be able to create a more efficient and predictable system to review the uses of privacy technology.

STANDING AS A CONSTITUTIONAL GATEKEEPER: CIVIL STANDING AND CIVIL RIGHTS

In order to properly fashion adequate rules of standing in constitutional criminal procedure, it is useful to explore how standing has developed in civil litigation for civil rights.[36]

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[32] The Council on American-Islamic Relations Research Center has recently described the problem of civil rights challenges faced by Muslims in a post September 11th world. Reporting a 64 percent increase in anti-Muslim sentiment since the fall of the world trade center, the Council's executive summary explains,

> The fallout from September 11 continues to impact Muslim daily life, whether at school, in the workplace or in general public encounters. Mistreatment at the hand of federal government personnel continue to be reported in substantial numbers. FBI agents and other local law enforcement authorities have sometimes responded to hearsay reports, and conducted questionable raids and interrogations. . . . Also, many Muslim homes and businesses were raided and private property seized pending investigation. Moreover, queries by some FBI agents about mosque membership list and media reports about a proposed FBI counting of mosques raised widespread apprehensions among community members who believe they are being scrutinized based on their religious association.

Guilt By Association—The Status of Muslim Civil Rights in the United States 2003, CAI R, COUNCIL ON AMERICAN-ISLAMIC RELATIONS RESEARCH CENTER 1 (2003).

[33] *See* John Gibeaut, *Winds of Change*, 87 A.B.A. J. 32 (Nov. 2001) (discussing the creation of an office of homeland security).

[34] *Id.*

[35] The right to be let alone by government officials unless there exists sufficient cause is protected by the Fourth Amendment. This right is "perhaps the most personal of all legal principles. It is also one of the newest, since only the more sophisticated of societies have the interest and the ability to nurture that subtle and most personal possession of man, his dignity." MORRIS L. ERNST & ALAN U. SCHWARTZ, PRIVACY, THE RIGHT TO BE LET ALONE 1 (1962).

[36] *See generally* ROY L. BROOKS ET AL., CIVIL RIGHTS LITIGATION, CASES AND

There are many analogies between civil rights civil litigation and the assertion of constitutional criminal rights.[37] For example, each rests largely on the Fourteenth Amendment Due Process Clause to enforce various rights against state governments.[38] Both are based on concepts of personal freedom and autonomy and individual fundamental rights.[39] Both types of cases may lead to precedent that apply to large classes of other litigants. Finally, both civil and criminal individual rights claims are based on the notion that government must be just when it uses its power against individuals.[40] The government may not simply go about its business as a routine law breaker.[41] To sanction such government behavior would lead to disrespect for the rule of law.[42] When government becomes a lawbreaker, the dissatisfaction of those who are governed sometimes leads to drastic changes like in our own American revolu-

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PERSPECTIVES, 9-13, 48-50 (2d ed. Carolina Academic Press 2000). Civil Rights cases have been the primary work of the National Association for the Advancement of Colored People (NAACP) during the first part of the twentieth century. *Id.* Using the courts to protect personal rights was a new concept at that period in American jurisprudence. *Id.*

[37] Most civil rights litigation has an effect on a broad range of citizens rather than a purely private dispute.

[38] Like other individual rights found in the Federal Constitution, the incorporation doctrine makes many of those rights fundamental and fully applicable to government action of the several states.

[39] The Fourth Amendment reflects critical values. "Indeed, these rights are so strong that the Constitution prohibits the most minimal transgressions against them. . . . Personal security, liberty, and private property are not discrete interests; they unite to define significant attributes of individual freedom in the democracy." Morgan Cloud, *The Fourth Amendment During the* Lochner *Era: Privacy, Property and Liberty in Constitutional Theory*, 48 STAN. L. REV. 555, 576 (1996).

[40] *See* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 991 (1987) ("Constitutional law provides a set of peremptory norms—a checking power—that is basic to the American notion of a government of limited powers.").

[41] United States v. Berger, 295 U.S. 78 (1935).

[42] Government cannot be a law-breaker; judicial review of police conduct serves to enforce that principle. "[H]aving judges decide what police conduct violates the Fourth Amendment reflects a distrust of society's ability or willingness to apply the Fourth Amendment properly." George C. Thomas III & Barry S. Pollack, *Saving Rights from a Remedy: A Societal View of the Fourth Amendment*, 73 B.U. L. REV. 147, 149 (1993).

tion.[43]

Our system of criminal justice should also re-examine doctrine when new rules will encourage government to advance its goal to protect privacy values which contribute to the quality of life, even though the need for higher security may exist.[44] The concept that a litigant in court needs an interest in the litigation to challenge the conduct of a party in a suit is not a new concept.[45] In civil litigation, standing rules prevent courts from deciding issues on behalf of parties that have no stake in a legal dispute.[46] As a matter of civil procedure, standing rules are crafted to uphold the legal principal that courts are for the purpose of resolving actual, as opposed to hypothetical, disputes.[47]

Courts do not make themselves available to give advisory opinions on rights and remedies, and standing rules are one of the tools they use to ignore the merits of many disputes.[48] The

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[43] "Advances in science and technology recurrently exert pressure on the scope and meaning of the Fourth Amendment, but the privacy and security protected by the Fourth Amendment should not depend on innovations and technology. . . . During the Framers' era, the home was the focal point of privacy and personal security." Tracey Maclin, Katz, Kyllo, *and Technology: Virtual Fourth Amendment Protection in the Twenty-First Century*, 72 MISS. L.J. 51 (2002) (footnotes omitted). "When the American Republic was founded, the framers established a libertarian equilibrium among the competing values of privacy, disclosure and surveillance." ALAN F. WESTIN, PRIVACY AND FREEDOM 67 (1967).

[44] *See supra* note 4.

[45] Standing in civil cases is often based on the injury sustained. In *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923), the Supreme Court held that a taxpayer who objected to the federal government giving grants to the states to fund a reduction in infant mortality did not have standing to sue. She claimed the grants would increase her tax liability. *Id.* at 486. The Court reasoned that she had no immediate danger or direct injury from the government action. *Id.*

[46] *See* Flast v. Cohen, 392 U.S. 83 (1968) (holding that a taxpayer would have standing to oppose the Federal Aid to Education Act on establishment clause grounds if they can show a logical nexus between the status of the taxpayer and the claim; the Court reasoned that the specific constitutional limitation of government support for religion provided a sufficient nexus).

[47] *See* Massachusetts v. Mellon, 262 U.S. 447 (1923) (holding that general standing as a citizen does not establish enough direct injury to file suit).

[48] Generally, the cases and controversies requirement of Article III, Section 2 limits review of hypothetical questions by the court and prohibits the federal court from issuing advisory opinions. Such a rule assures that courts will decide only focused and specific conflicts between adversaries. *See* United States v.

obvious reason for avoiding such intervention as a routine matter is to preserve the division of governmental responsibility. Courts decide disputes while legislatures craft law. The balance of power dictates that courts should confine their role to the decision-making necessary to keep the peace.[49] Occasionally, a court my render some guidance on such tangential matters, but such opinions are clearly the exception to the general, well-settled rule.[50]

In the context of civil litigation, the doctrine of standing, ripeness,[51] and case and controversy[52] have stood as a barrier to the courts from aggressively making law without benefit of a plaintiff. These rules leave to the legislative and executive branches of government the responsibility of creating desirable policies for addressing societal problems that are not in the adversarial position needed for court based dispute resolution.[53]

Fruehauf, 365 U.S. 146 (1961).

[49] Resolving disputes peacefully includes the judiciary's interest in reaching a decision which is also final between the parties. *See* Chicago & S. Airlines v. Waterman S.S. Corp., 333 U.S. 103 (1948).

[50] The Supreme Court has occasionally reviewed cases when they might otherwise be moot because the issue is "capable of repetition, yet evading review." *See, e.g.*, S. Pac. Terminal Co. v. Interstate Commerce Comm'n, 219 U.S. 498, 514 (1911).

[51] *See* United Pub. Workers of Am. v. Mitchell, 330 U.S. 75 (1975) (holding that federal public employees wishing to challenge the Federal Hatch Act, which prohibited certain types of political activity, had no standing because the issue was not yet ripe; the workers did not describe the acts in which they wanted to engage).

[52] The case and controversy requirement is a doctrine which courts invoke to avoid deciding certain types of matters describing them as either not ripe or moot. As one scholar has cogently explained:

> The mootness doctrine is derived from the Article III prohibition against federal courts issuing advisory or declaratory opinions where no active controversy exists. If there is no longer an active controversy between adverse parties then the case should be found moot. One exception to the mootness doctrine is the voluntary cessation exception. Under this exception, voluntary cessation of the improper behavior by one party will not cause the case to be dismissed if the party is free to return to the behavior at any time.

Marc M. Harrold, *Stripping Away at the First Amendment:The Increasing Paternal Voice of Our Living Constitution*, 32 U. MEM. L. REV. 403, 423 (2002) (footnotes omitted).

[53] I do not intend to suggest that legislative role in protecting privacy is not

Such challenges were often faced where litigants attempted to bring actions to court during the civil rights era.[54] Lawyers from the National Association for the Advancement of Colored People constantly faced these barriers when it attempted to bring progressive civil rights reforms to the nation through use of the court system.[55] The need for aggrieved plaintiffs never ended, particularly in cases that would take years, sometimes decades, to resolve in the litigation process.[56]

In the famous case of *Brown v. Board of Education*[57] for example, the litigation that ultimately lead to the landmark Supreme Court decision was actually several law suits with many plaintiffs from several jurisdictions.[58] The cases were developed simultaneously so that at least one of them would survive to the nation's highest court. The strategy finally worked, but the lawyers lost many litigants along the way.[59]

In other civil rights litigation like *NAACP v. Alabama*,[60]

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essential. In the same way courts are likely to address more privacy issues, legislatures should be alert to respond to privacy concerns where there is consensus that such intrusions should be regulated.

[54] During early civil rights litigation, sometimes courts would seek ways to dismiss "separate but equal" claims on any basis possible. In one instance, the legendary Thurgood Marshall, serving as chief counsel for the NAACP during the 1950's, had a case dismissed in South Carolina because the parent of the child who sought school bus services paid his property taxes in a county different from the county where the only available "colored" school was located. RICHARD KLUGER, SIMPLE JUSTICE 3-17 (1976). In planning to file a new case, Marshall announced that he would seek a "firm, unified group of twenty plaintiffs" to prevent dismissal on a technicality based on standing. *Id.* at 18.

[55] Civil Rights litigation required filing a number of cases in different jurisdictions. In 1951, for example, the NAACP Legal Defense Fund lawyers travelled 72,000 miles litigating Civil Rights cases. *See* JACK GREENBERG, CRUSADERS IN THE COURTS 81 (1994).

[56] The litigation strategy to overturn the *Plessy v. Ferguson*, 163 U.S. 537 (1896), separate but equal doctrine required a litigation strategy which took decades to accomplish through a series of Supreme Court cases. *See* KLUGER, *supra* note 54.

[57] 347 U.S. 483 (1954).

[58] *Id.* at 486. Brown was actually a consolidation of five cases from not only Kansas, but also Delaware; South Carolina; Washington, D.C.; and Virginia.

[59] Those who participated in the cases would often be threatened financially with refusal of credit and farm supplies if they filed civil rights suits. *See* KLUGER, *supra* note 54.

[60] 357 U.S. 449 (1958). In *NAACP v. Alabama*, the Court held that the civil

issues of standing again confronted the Supreme Court as it struggled to fashion fair rules to permit constitutional rights to be properly determined by the court without the interference of procedural barrier.[61] The Court properly recognized that there is something about civil rights litigation that distinguishes it from ordinary cases and controversies and allows the Court to resolve purely private matters.[62]

CRIMINAL STANDING: UNSTABLE ORIGINS

From the very beginning of challenges to police conduct on constitutional grounds one of the primary issues has been who gets to complain.[63] In the early 1900's, the Supreme Court resolved a dispute on that issue in *Weeks v. United States*.[64] The Supreme Court recognized the need to establish an exclusionary rule to prohibit illegally seized evidence from being introduced at trial.[65] Although Weeks was not a standing case, it illustrated the direction the litigation on police intrusion would take in the decades to come.[66] Thereafter, the

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rights organization did not have to disclose its membership list because "privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *Id.* at 462. Implicit in the holding is that the unnamed members had standing to assert their protected association rights.

[61] The barriers to civil rights litigation was not restricted merely to procedural matters, but also extended to threats of violence. "In making trips to southern court houses, there were many close calls. Threats of lynching, assault and murder were routine." CARL ROWAN, DREAM MAKERS, DREAM BREAKERS 7 (1993).

[62] However, the Supreme Court has also denied standing based upon minority group status. *See* Allen v. Wright, 468 U.S. 737 (1984) (parents of black school children who sued the IRS claiming that discriminatory private schools should not receive tax exempt status were denied standing). The Court ruled that such "stigmatizing injury" was not enough to confer status on the parents. *Id.* at 738. In some instances a civil rights organization should be permitted to serve as a "private attorney general" for purpose of litigating civil rights actions. HARRY KALVEN, JR., THE NEGRO AND THE 1ST AMENDMENT 80 (1965) (quoting Comment, *Private Attorneys-General: Group Action in the Fight for Civil Liberties*, 58 YALE L.J. 574, 581-89 (1949).

[63] Police have always relied on sources of information that they may have come about by practices they could not engage in themselves.

[64] 232 U.S. 383 (1914).

[65] *Id.* at 392.

[66] *See* T.S.L. Perlman, *Due Process and the Admissibility of Evidence*, 64

court struggled with the relationship between federal and state criminal justice investigations and how to best conduct them.[67]

The key issues often centered around the exclusionary rule which had been recognized by the Supreme Court in *Weeks* but had not been adopted in many states.[68] Thus, in states that did not provide the remedy of exclusion of the evidence, police were free to engage in misconduct without fear that they would loose any evidence at trial.[69]

It was not until *Wolf v. Colorado*[70] in 1949 that the Court recognized that illegal state searches may violate the Federal Constitution, but the Court was unwilling at that time to apply the exclusionary rule to the states.[71] In an opinion by Justice Felix Frankfurter, the Court rejected the adoption of a national exclusionary rule to be applied; instead, the Court suggested that civil law suits and other local checks on police would suffice.[72] This conclusion was hotly disputed by Justice Murphy in his dissenting opinion.[73]

This ideological battle over the proper remedy for police violation of the Fourth Amendment has had an enormous impact on the development of principles related to standing.[74]

HARV. L. REV. 1304 (1951).

[67] *Id.*

[68] *Id.*

[69] Almost two decades after the exclusionary rule had been adopted in *Mapp*, President Ronald Reagan established a commission which recommended it be abolished. In its report, the task force explained:

> Legislation should be proposed and enacted to abolish the exclusionary rule as it is applied to Fourth Amendment issues.
>
> . . .
>
> . . . Anyone evaluating the exclusionary rule must constantly keep this basic premise in mind. The Framers of the Constitution did not create the exclusionary rule for violations of the Fourth Amendment. They could have done so. . . . The exclusionary rule is instead a judicially created rule of procedure that fails to serve the goals it seeks, and fails at a tremendous cost.

PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 24-25 (1982).

[70] 338 U.S. 25 (1949).

[71] *Wolf*, 338 U.S. at 31.

[72] *Id.*

[73] *Id.* at 42 (Murphy, J., dissenting).

[74] *Id.*

That is because if reluctance to impose the severe sanction of exclusion is present in a court's analysis of Fourth Amendment claims, then it might be tempted to seek limitations on standing to avoid rendering favorable relief to a criminal defendant.[75] When there was no exclusionary rule, there was little need to erect complicated standing principles because there was no fear that evidence would be excluded from consideration.[76] The absence of standing cases in the Fourth Amendment arena prior to *Mapp v.Ohio*[77] may well be explained by the absence of the exclusionary sanction in state courts.

Prior to *Mapp*, the Supreme Court had little trouble concluding that the government could not use illegal practices against an individual with no standing in order to obtain evidence against another defendant.[78] In *McDonald v. United States*,[79] the Court held that a co-defendant had the right to

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[75] As one scholar has observed:

> The rules or "legal technicalities," as they are sometimes called by persons disgusted with a particular outcome, are not devised solely with an eye to ascertaining guilt or punishing the guilty; that could be expeditiously with the thumbscrew and very efficiently and inexpensively in our pharmacological age with one sort of drug or another. . . . The reason for this is not hard to find. The forms of due process may protect the criminal, but, more importantly, they also protect the innocent.

WALTER BERNS, TAKING THE CONSTITUTION SERIOUSLY 185 (1987).

[76] It was not until *Weeks v. United States*, 232 U.S. 383 (1914), that the Supreme Court recognized the exclusionary rule in federal trials barring the use of illegally seized evidence. *Weeks*, 232 U.S. at 398.

[77] 367 U.S. 643 (1961).

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> It has long been the case, however, that nearly all claims to enforce constitutional rights may be raised only by those who have "standing" to assert them. The Fourth Amendment is no exception to this principle. That is, a person who makes a motion to suppress evidence that the government intends to use against him at trial must show that he was "a victim of search or seizure . . . directed at someone else."
>
> In short, Fourth Amendment rights are personal. They may not vicariously be asserted.

JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE 355 (3d ed. 2002) (footnotes omitted) (quoting Jones v. United States, 362 U.S. 257, 261 (1960), *overruled on other grounds*, United States v. Salvucci, 448 U.S. 83 (1980)).

[79] 335 U.S. 451 (1948).

complain about searches of his alleged accomplices.[80] The Supreme Court, however, backed away from *McDonald*'s defendant-friendly principle in *Wong Sun v. United States*[81] and *Alderman v. United States*.[82]

Clearly, a plausible explanation for the erosion of the so-called derivative standing rule[83] is the Court's application of the exclusionary principle adopted in *Mapp*. The controversy that generated from the Court's incorporation of the exclusionary rule led to an inflammatory national debate about the Warren Court's criminal justice jurisprudence.[84]

Limitations on standing merely served to ease the blow of the *Mapp* decision which was seen as another liberal opinion of a defendant-friendly Supreme Court.[85] Indeed, the criticism of the Warren Court became quite severe by legal scholars.[86]

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[80] *McDonald*, 335 U.S. at 456.

[81] 371 U.S. 471 (1963).

[82] 394 U.S. 165 (1969).

[83] *See Wong Sun*, 371 U.S. at 488 (overruling sub silentio the notion of derivative standing).

[84] As early as the 1950's, Chief Justice Earl Warren was criticized for being soft on crime by other members of his profession. "The Conference of State Chief Justices in 1958 went so far as to pass a resolution condemning the Warren Court for its erosion of federalism and its tendency 'to adopt the role of policymaker without proper judicial restraint.'" DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 306-07 (1986).

[85] One commentator poses the question about the effectiveness of the Warren Court in this way:

> Did the Warren Court['s] criminal justice decisions have any real effect on the behavior of police? Some have suggested that the criminal justice decisions were a failure. It has been argued that while some Supreme Court decisions have resulted in allowing concededly guilty defendants to go free, there has been no demonstrable beneficial change in police practices.

MORTON J. HORWITZ, THE WARREN COURT AND THE PURSUIT OF JUSTICE 96 (1998).

[86]

> Eminent scholars from many fields have commented upon the [Warren Court's] tendency towards over-generalization, the disrespect for precedent, even those of recent vintage, the needless obscurity of opinions, the discouraging lack of candor, the disdain for the fact finding of the lower courts, the tortured reading of statutes, and the seeming absence of neutrality and objectivity.

Milton Handler, *The Supreme Court and the Antitrust Laws: A Critic's View Point*,

After *Mapp*, the *Gideon v, Wainwright*[87] decision was yet to come, imposing the cost of court appointed counsel on the State to enforce these newly recognized constitutional rights.[88] Later in the decade, the Court would again borrow from well-established federal investigative practice and require state police to give warning to criminal suspects in the historic decision of *Miranda v. Arizona*.[89] *Miranda* again spurred the national debate about the Warren Court's criminal justice policies.[90]

Three years later, the Supreme Court dealt the first of several sever blows to the Fourth Amendment in *Alderman v. State* [91]when it held that granting standing to Alderman would "encroach[] upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth."[92] As one insightful commentator has noted, "[e]ssentially, the standing requirement is the Supreme Court's declaration that the cost of the exclusionary rule can become too great to bear."[93]

Rather than a mere procedural requirement, *Alderman* triggered an era where standing became a substantive limitation on the right to assert a violation of personal privacy.[94] At a time when the Court was recognizing new zones of privacy like in *Roe v. Wade*[95] and *Griswold v. Connecticut*,[96] the Court was expressing its preference for privacy in broad contexts.[97]

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1 GA. L. REV. 339, 350 (1967).

[87] Gideon v. Wainwright, 372 U.S. 335 (1963).

[88] *Gideon*, 372 U.S. at 342-44.

[89] 384 U.S. 436 (1966).

[90] The *Miranda* opinion was greatly criticized by some legal scholars. *See, e.g.*, Joseph D. Grano, Miranda v. Arizona *and the Legal Mind: Formalism's Triumph Over Substance and Reason*, 24 AM.CRIM. L. REV. 243 (1987).

[91] 394 U.S. 165 (1969).

[92] *Alderman*, 394 U.S. at 175.

[93] DRESSLER, *supra* note 78, at 359.

[94] *Id.* at 301-302.

[95] 410 U.S. 113 (1973).

[96] 381 U.S. 479 (1965).

[97] *See, e.g.*, *id.*; Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 772 (1986) ("Our cases long have recognized that the Constitution em-

KATZ, SMITH AND *RAKAS*: RECONCILING STANDING AND REASONABLE EXPECTATIONS OF PRIVACY

Perhaps the most familiar phrase in all Fourth Amendment jurisprudence is the "reasonable expectation of privacy."[98] Unfortunately, it explains little, leaves many questions unanswered and presents one of the greatest constitutional moving targets of all time.[99] This is particularly true in our high technology age.[100] This is an amazing legacy of a word that has been in the constitutional lexicon for less than four decades.[101]

It may be that "reasonable expectation of privacy" is an utterly undeterminable phrase since it requires any interpreter of its provisions to first define the audience to which its words apply.[102] In the midst of this confusion, both the rules of privacy protection under the Fourth Amendment and the doctrine of standing have become hopelessly tangled together.[103]

Ironically, it was a case that favored the defendant which began the faulty framework for the standing problem that plagues the current Supreme Court jurisprudence. In *Katz v. United States*,[104] the Court held that the government illegally

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bodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government.").

[98] A reasonable expectation of privacy is the legal determination of the substantive Fourth Amendment right to privacy. It has the practical effect of establishing when the right may be asserted. *See* Hudson v. Palmer, 468 U.S. 517, 526 (1984) (holding that prisoners have no legitimate reasonable expectation of privacy in the contents of their jail cells).

[99] When one speaks of vague concepts like "reasonable" and "expectation," interpretation is necessarily broad since these ideas are subjective even when an attempt at reaching group consensus is attempted. *Id.* at 525.

[100] *See supra* note 43 and accompanying text.

[101] *See supra* note 43 and accompanying text.

[102] "In Orwell's society, there was no right of privacy or expectation of privacy. In our society, privacy is highly valued and some legal rights of privacy do exist. Yet privacy, in the sense of being able to control information about oneself, is also an eroding condition." M. ETHAN KATSH, LAW IN A DIGITAL WORLD 227-28 (1995) (footnote omitted).

[103] *See, e.g.*, Rawlings v. Kentucky, 448 U.S. 98 (1980) (standing and search and seizure are concepts that are difficult to separate).

[104] 389 U.S. 347 (1967).

intruded on a telephone conversation by attaching an electronic listening and recording device to the outside of a public telephone booth.[105]

In reaching its conclusion, the Court relied on several circumstances that would be difficult to duplicate today.[106] The Court reasoned that the intrusion on the incriminating telephone call was improper because once Katz placed the fee in the phone and closed the door he created a setting where he did not expect to be overheard.[107]

The majority's opinion written by Justice Potter Stewart rested on the curious and unnecessarily restrictive statement that the "Fourth Amendment protects people, not places."[108]

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[105] *Katz*, 389 U.S. at 348. In *Olmstead v. United States*, 277 U.S. 438, 466 (1928), the Supreme Court approved wiretapping, concluding that it did not amount to a search and seizure under the Fourth Amendment. In one of the most famous dissenting opinions in American history, Justice Louis Brandeis prophesied:

> The progress of science in furnishing the Government with means of espionage is not likely to stop with wire-tapping. Ways may some day be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home.

Olmstead, 277 U.S. at 473-74 (Brandeis, J., dissenting).

[106] When you consider how technology makes issues obsolete, *Katz* itself provides an ironic example. At the time of the decision, telephone booths were common. Currently, few people make calls from an enclosed telephone booth.

[107] An important aspect of electronic searches is their potential scope. They are not merely limited to information or historical facts, but permit access to discovering future events. As one commentator explained:

> The conventional search is limited to a designated thing in being—one of a finite number of things to be found in the place where the search is to be conducted, and ordinarily discoverable in a single brief visit. On the other hand, electronic surveillance is a quest for something which may happen in the future. Its effectiveness normally depends upon a protracted period of lying-in-wait. For however long that may be, the lives and thoughts of many people—not merely the immediate target but all who chance to wander into the web—are exposed to an unknown and undiscriminating intruder. Such a search has no channel and is certain to be far more pervasive and intrusive than a properly conducted search for a specific, tangible object at a defined location.

Ralph S. Spritzer, *Electronic Surveillance By Leave of the Magistrate: The Case in Opposition*, 118 U. PA. L. REV. 169, 189 (1969).

[108] *Katz*, 389 U.S. at 351.

He also stated that the Fourth Amendment could not be translated into a general constitutional right to privacy.[109] Stewart, however, ultimately rested his decision on the proposition that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[110]

However, it was in John Marshall Harlan's concurring opinion that it was first articulated that a person has a "reasonable expectation of privacy" in certain activities.[111] He described what he believed were the two components necessary to establish such a privacy right. First, the person must have exhibited an actual subjective expectation of privacy.[112] Second, the individual must establish that it was an expectation "society is prepared to recognize as 'reasonable.'"[113]

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[109] *See supra* note 24 and accompanying text.

[110] *Katz*, 389 U.S. at 351-52 (citation omitted).

[111] *Id.* at 361 (Harlan, J., concurring).

[112] *Id.* What we feel is private from others is based not only on our perception of whether we are in a secure setting, but how interested we believe others may be in what we are doing.

[113] *Id.* One Fourth Amendment historian has explained that the:

> Amendment provides that if there be a search and seizure it must be a reasonable one. The only absolute standard that is set is as to the essentials of the warrant when such is necessary, as it is in most cases. The purpose of the latter part of the Amendment of course is to safeguard against the general warrant and it does this in two ways: first, by prescribing the requirement of probable cause, necessarily peculiar to uh case; and second by making requisite the description of the particular place to be searched, the person apprehended, and the objects to be seized.These requirements limit the scope of each warrant; they take the decision as to what may not be done out of the hands of the officer who is to execute the warrant, and place it with the more trustworthy and sober judgment of a judicial officer. It is for the latter to pass upon the merits of the allegations and, on the basis of evidence having behind it the responsibility of an oath, to decide whether there is reasonable justification for this exceptional proceeding in invasion of the individual's privacy, and thus to determine what particular actions are justified on the basis of this showing. There is no temptation for the ministerial officer to exceed the authority which the magistrate decides to give him, for he not only thereby subjects himself to civil and criminal liability but

It is difficult to establish Harlan's motivation for crafting such an ambitious and comprehensive search and seizure test. He afforded little justification for his new analysis and did not discuss some basic issues, like the potential impact of future technology on the reasonable expectations of persons seeking to keep a wide range of activities private.[114] Indeed, Harlan's heavy reliance on expectations may have begun the process of lowering the mark of Fourth Amendment protection from a somewhat fixed, stable set of privacy expectations based on property rights into a prohibition against government intrusion that shifts as governments' ability to intrude becomes improved by technology.[115]

> gains no advantage over the accused and merely wastes his efforts.

NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 120 (1937).

[114] One scholar has noted that the historical analysis of the Fourth Amendment has been somewhat unpredictable.

> [T]he Court has at times employed a non-historical analysis to interpret the commands of the Fourth Amendment. It has asserted that law enforcement practices are not "frozen" by those in place at the time the Fourth Amendment was adopted. Hence, interpretation of the Amendment permits modern developments: "Crime has changed, as have the means of law enforcement, and it would therefore be naive to assume that those actions a constable could take in an English or American village three centuries ago should necessarily govern what we, as a society, now regard as proper." Thus, the court has sometimes asserted that the Amendment's "prohibition against 'unreasonable searches and seizures' must be interpreted 'in light of contemporary norms and conditions.'"

Thomas K. Clancy, *What Constitutes an "Arrest" Within the Meaning of the Fourth Amendment*, 48 VILL. L. REV. 129, 184 (2003) (quoting Steagald v. United States, 451 U.S. 204, 217 n.10 (1981)) (footnotes omitted).

[115] The ability of government to intrude electronically increases each day as technology advances. With statutory controls it is likely that fewer areas of our lives can be kept private. One insightful commentator has explained that:

> "[E]lectronic surveillance is almost inherently indiscriminate." Interception of a telephone line provides to law enforcement all of the target's communications, whether they are relevant to the investigation or not, raising concerns about compliance with the particularity requirements in the Fourth Amendment and posing the risk of general searches. In addition, electronic surveillance involves an on-going intrusion in a protected sphere, unlike the traditional search warrant, which authorizes only one intrusion, not a series of searches or a continuous surveillance. Officers

The test articulated by Harlan in *Katz* was embraced by the Supreme Court in *Smith v. Maryland*[116] where the Court distinguished the privacy expectation it had protected in the *Katz* telephone booth from that of a telephone company's "pen register."[117] The pen register is the telephone company's device, housed at its facility, which records the dialed telephone numbers of a given telephone.[118] At the behest of the government, the dialed numbers from Smith's telephone were recorded and turned over to the government.[119]

The Court noted that the pen register had a much more limited capacity than the listening device used in *Katz*.[120] The court explained "[a]lthough most people may be oblivious to a pen register's esoteric functions, they presumably have some awareness [from notices in phone books] of one common use: to aid in the identification of persons making annoying or obscene calls."[121] The Court reached the conclusion on little more than loose conjecture that Smith probably did not believe the numbers he dialed were private.[122]

The Court further dispatched the defendant's constitutional

> must execute a traditional search warrant with dispatch, not over a prolonged period of time. If they do not find what they are looking for in a home or office, they must leave promptly and obtain a separate order if they wish to return to search again. Electronic surveillance, in contrast, continues around-the-clock for days or months. Finally, the usefulness of electronic surveillance depends on lack of notice to the suspect.

James X. Dempsey, *Communications Privacy in the Digital Age: Revitalizing the Federal Wiretap Laws to Enhance Privacy*, 8 ALB.L.J. SCI. & TECH. 65, 70 (1997) (quoting Lopez v. United States, 373 U.S. 427, 463 (1963) (Brennan, J., dissenting)) (footnotes omitted).

[116] 442 U.S. 735 (1979).

[117] *Smith*, 442 U.S. at 741-45; *see* United States v. Thompson, 936 F.2d 1249 (11th Cir. 1991) (holding that information obtained from pen register placed on telephone line is admissible even if order authorizing it did not comply with statutory requirements).

[118] *Smith*, 442 U.S. at 737.

[119] *Id.* at 742.

[120] *Id.* at 741.

[121] *Id.* at 742.

[122] *Id.* The notion that at the time *Smith* was decided a telephone caller would believe that their dialed number was generally available would be inaccurate.

claim by concluding that the telephone company was a third party to whom the defendant voluntarily exposed the dialed number.[123] Thus, the Court reasoned, the defendant's expectation of privacy was not reasonable.[124] This logic, though easy to explain on its face, has many intellectual flaws.

First, it defies logic to suggest that any one person would publish to the public all the calls he made during the course of his day.[125] The telephone company at that time was a monopoly for which no reasonable communication options existed. To equate the entity of the telephone company with a careless sharing of information with a friend you should not have trusted is not a fair assessment of anyone's reasonable understanding of privacy.[126]

As the dissenters appropriately noted, the "prospect of unregulated governmental monitoring . . . [is] disturbing even to those with nothing illicit to hide. Many individuals, including members of unpopular political organizations or journalists with confidential sources, may legitimately wish to avoid disclo-

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[123] *Id.* at 743-44.

[124] *Id.* at 744.

[125] If there is any doubt that the government continues to construe *Smith* with any less than the broadest possible scope, the testimony of Deputy Associate Attorney General Kevin DiGregory during a congressional hearing on government surveillance issues is instructive. DiGregory said:

> [T]he Supreme Court held in *Maryland v. Smith* [sic], I believe in 1979, that there was no reasonable expectation of privacy in numbers dialed by a telephone because essentially, when someone turns over information to a third party like the telephone company, they should not have either a subjective or an objective reasonable expectation of privacy in that information.

See Fourth Amendment Issues Raised by the FBI's "Carnivore" Program: Hearing Before H. Subcomm. on the Constitution, H. Comm. on the Judiciary, 106th Cong. 78 (2000) (statement of Kevin V. DiGregory, Deputy Assoc. Att'y Gen.).

[126] In *United States v. Hoffa*, 385 U.S. 293, 303 (1966), the Supreme Court held that the use of a government informant who turned out to be a false friend was not a violation of Hoffa's constitutional rights. The expectation that we must live our life constantly on guard for who we may trust is an unsettling idea that the law should be concerned if our society truly values personal privacy. "The concept of intrusion holds that a protected zone of privacy exists into which governments and others cannot ordinarily and freely intrude for purposes of obtaining information." NIMMER *supra* note 18, at 16-8.

sure of their personal contacts."[127]

It is difficult to measure the harm to Fourth Amendment jurisprudence done by the unartful opinion in *Smith*. By using the reasonable expectation of privacy doctrine as the cornerstone of its analysis, it improperly applied both the spirit and the letter of the test as it reached its decision.[128]

The very nature of the telephone company's pen register technology, as a monopolistic database available to the government without warrant requirement protection for citizens, lowered the analytical fence for a whole generation of new technologies not even dreamed possible by the Supreme Court at the time of the *Smith* decision.[129] Today, the pen register has come home in the form of caller ID technology which we now take for granted.[130] But how many of us would like any-

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[127] *Smith*, 442 U.S. at 751 (Marshall, J., dissenting).

[128] "The analogy in personal information focuses more on the value of nondisclosure. Privacy rights apply to information not widely and generally known . . . for which disclosure might cause loss in terms of harassment, embarrassment, or similarly adverse consequences because of the sensitivity of the information to the individual." *See* NIMMER, *supra* note 18, at 16-6.

[129] *See* EMORD, *supra* note 22.

[130] Extending the logic of *Smith v. Maryland*, courts have held that caller identification systems that trap and preserve numbers present no constitutional problem because there is no protected privacy interest in the information. For example, in *Southern Bell Telephone & Telegraph Co. v. Hamm*, 409 S.E.2d 775, 779-80 (S.C. 1991), the court explained:

> The United States Supreme Court has previously held that callers do not have an expectation of privacy in the numbers they dial. . . . In light of [this] holding . . . that the telephone number of the equipment from which a call has been placed is entitled to more privacy than the telephone numbers called by someone. The telephone number from which a call which is placed . . . is numerical information passed through the telephone network, voluntarily transmitted as a result of call placement. Caller ID service simply does not violate any right that rises to the level of constitutional protection. No fundamental interest is involved in the anonymity of a telephone number.

One court however, has held that under its state wiretapping law, caller ID without a blocking mechanism violated privacy rights. Barasch v. Pa. Pub. Util. Comm'n, 576 A.2d 79, 89 (Pa. Commw. Ct. 1990). That court reasoned, "telephone service [customers] should not suffer an invasion, erosion or deprivation of their privacy rights to protect the unascertainable number of individuals or groups who receive nuisance, obscene or annoying telephone calls which can already be traced or otherwise dealt with." *Id.*

one, particularly government officials, to have any-time access to our caller ID box or our cellular telephone bill complete with telephone numbers called and received and our geographical location, and time of both received those who we contacted and those who tried to contact us.[131] Because of the *Smith* decision, any information kept in any communication company database would not be private simply because the third-party vendor collected it on an electronic database.[132]

The troubling consequence of the *Smith* opinion is that all feelings that an individual possesses about privacy are subordinated to the fact of the locations where the private information is stored.[133] Critical to the existence of any constitutional right under the *Smith* analysis is the question of "where the information lives?".[134] Is it in a network system, a home com-

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[131] *See* United States v. Smith, 978 F.2d 171 (5th Cir. 1992).

[132] The broadest implication of *Smith* would suggest that "[e]fforts to apply general restrictions on government data collection under concepts of constitutional information privacy [will] generally fail." *See* NIMMER, *supra* note 18, at 16-24.

[133] Electronic communication from the privacy of one's home has clearly been diminished by the *Smith* approach. As one scholar has explained, traditionally, the home enjoyed the greatest degree of constitutional protection:

> Indeed, one could say that the Framers were particularly sensitive about safeguarding private homes from governmental intrusion, as the constitutional privilege against unreasonable search and seizure "arose from the harsh experience of householders having their doors hammered open by magistrates and writ-bearing agents of the crown. . . . "
> There is no doubt that the Framer's envisioned the home as deserving special protection from governmental intrusion. The common law developed strict rules regarding when an officer could forcibly enter a person's home to effectuate an arrest or conduct a search. Arrest warrants were generally required to enter a home to make an arrest, and warrants were obligatory if government officers wanted to enter a home to conduct a search. In other words, a warrantless search of a home was out-of bounds, so to speak.

Tracey Maclin, *Let Sleeping Dogs Lie: Why the Supreme Court Should Leave Fourth Amendment History Unabridged*, 82 B.U. L. REV. 895, 933-34 (2002).

[134] One scholar has suggested that the proper question for purposes of determining whether there has been a constitutional violation of one's privacy interest is "whether the papers or personal property [is] mine, whether the house is mine, whether the body is mine? If the answer is yes, then one has the right to exclude the government from searching or seizing." Thomas K. Clancy, *Coping with Technological Change:* Kyllo *and the Proper Analytical Structure to Measure the Scope of Fourth Amendment Rights,* 72 MISS. L.J. 525, 564 (2002) (suggesting

puter hard drive or a distant internet connected database? Under *Smith*, it may not matter because all are accessible to a third party—the custodian of the database.[135]

In the electronic storage world brought about by the growth of personal computing, network systems and the internet over the past decade,[136] the ramifications of *Smith* suggest a world where the responsibility to prove a constitutional right rests with the person who seeks privacy but cannot totally guarantee that all he seeks to keep private is absolutely secure. It would be troubling to believe the Founding Father's would have found such a narrow view of the Fourth Amendment acceptable.[137]

It is equally troubling to believe that expectations of privacy are dictated solely by the government's ability to intrude with improved technology rather than one's legitimate desire to keep information private.[138] Such formulations would leave

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that although government has the right to reasonable intrusion on privacy, "the burden is [always] on the government to justify its actions").

[135] The Supreme Court rejected a challenge to a New York central computer databank containing the names and addresses of all persons obtaining drugs by prescription. The Court concluded:

> We are not aware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files . . . . The right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures.

Whalen v. Roe, 429 U.S. 589, 605 (1977).

[136] Courts have ruled that e-mail and subscriber information is not entitled to Fourth Amendment protection because individuals have no legitimate privacy interest. *See, e.g.*, Guest v. Leis, 255 F.3d 325 (6th Cir. 2001).

[137] One Supreme Court Justice has said:

> [T]he concepts of privacy which the Founders enshrined in the Fourth Amendment vanish completely when we slavishly allow an all-powerful government, proclaiming law and order, efficiency, and other benign purposes, to penetrate all the walls and doors which men need to shield them from the pressures of a turbulent life around them and give them health and strength to carry on.

United States v. White, 401 U.S. 745, 756 (1971) (Douglas, J., dissenting).

[138] A grave concern is that one's expectations are dictated by the government's ability to intrude.

> The emphasis on subjective expectations poses a further serious threat to

only the traditional contents of a private home protected.

Automobiles have lost almost all privacy.[139] They can be stopped for even the most trivial of reasons and searched very easily after they are stopped.[140] Drug detection dogs can be brought to the scene of the stops,[141] and guests in the vehicle have little right to object to any intrusion of their movement once the vehicle is pulled over.[142]

IMPRACTICAL STANDING: AVOIDING WASTED TIME AND OPPORTUNITY

One of the problems confronted by courts is the temptation to avoid resolving constitutional issues on the basis of the standing doctrine when a good deal of effort has been done to craft the substantive Fourth Amendment issues.[143] Many courts have demonstrated a willingness to avoid reaching the merits of a Fourth Amendment issue even when the answer fills obvious gaps in a dispute in a case involving multiple co-defendants[144] are police search procedures that are likely to

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> the vitality of the [F]ourth [A]mendment. Repeated invasions by credit bureaus, employers, and the like can lead persons to discount most expectations as unreasonable; individual fears of a loss of privacy then become self-fulfilling prophecies. In particular, the government can through its actions redefine popular expectations so as to undermine constitutional rights.

Comment, *Legitimate Expectations of Privacy Against Unreasonable Searches and the "Automatic Standing Rule,"* 94 HARV. L. REV. 196, 203 (1980) [hereinafter *Legitimate Expectations*].

[139] *See* Whren v. United States, 517 U.S. 806, 814-815 (1996) (unanimously ruling that the police officer's subjective intent is irrelevant to the constitutional validity of a traffic stop).

[140] *See* Tracey Maclin, *The Fourth Amendment on the Freeway*, 3 RUTGERS RACE & L. REV. 117 (2001) (detailing the broad powers of police making vehicle stops).

[141] *See, e.g.*, United States v. Lingenfelter, 997 F.2d 632, 637 (9th Cir. 1993) (dog sniff not a search because individual did not have a reasonable expectation of privacy in contraband stored in his warehouse).

[142] *See* Maclin, *supra* note 140, at 142-43.

[143] *See, e.g.*, Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004) ("The Standing requirement derives from the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary.").

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recur over and over again.

No case illustrates the temptation to avoid ruling on the constitutional merits more than *Ricks v. State*.[145] In *Ricks*, the Baltimore City Police Department pursued a Baltimore drug investigation which ultimately resulted in the prosecution of three co-defendants.[146] "James A. Ricks, Kevin R. DeShields and Van Allen Lewis [] were identified as part of the narcotics distribution organization."[147] During the course of the investigation the police used "pen registers, physical surveillance, and 'wiretap' orders" to gain information about the suspected drug organization.[148]

On June 8, 1984, Baltimore City Circuit Court Judge Milton B. Allen issued an order authorizing the use of an electronic listening and recording devices at 2500 Edgecomb Circle North Apartment I.[149] Prior to becoming a judge, Milton Allen

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> In a 22-page order, Judge Allen concluded that there was probable cause to believe that the controlled dangerous substances laws were being violated by individuals using the subject apartment; that the use of the audio and video devices was necessary and essential to gain evidence leading to the solution of these crimes and the prosecution of all individuals therewith connected. The order specified that evidence could not be otherwise obtained since alternate investigative methods had been tried and failed and will not succeed in the future, or were too dangerous to undertake.

Ricks v. State, 537 A.2d 612, 615 (Md. 1988).

[145] Ricks v. State, 520 A.2d 1136 (Md. Ct. Spec. App. 1987), *aff'd* 537 A.2d 612 (Md. 1988).

[146] *Id.* at 1138.

[147] *Id.*

[148] *Id.*

[149] *Id.*

> Pursuant to Judge Allen's order, officers entered the air ducts of the apartment through the roof, shaved away part of the dry wall and implanted a miniature camera, focused on the dining room of the apartment. After several weeks of observation and twenty-five hours of recorded video tape, a search warrant was issued to search the apartment on August 7, 1984. Both heroin and cocaine were seized. The appellants Ricks and DeShields were arrested within the apartment. Appellant Van Allen Lewis was also present in the apartment during the raid; he fled and was captured shortly thereafter.

Ricks, 537 A.2d at 615.

was the first African-American State's Attorney in Baltimore City when elected in 1971. Before that time he had spent a long, noteworthy career as a criminal defense attorney.[150]

According to investigation records, the apartment was suspected of being a "processing house" or "cut house" for diluting and packaging drugs for street sale.[151] The men were charged with and convicted of possession with the intent to manufacture or distribute heroine and cocaine.[152] An appeal was taken to the State's intermediate appellate court, the Court of Special Appeals. That court refused to reach the merits of appellant's Fourth Amendment search and seizure claim.[153]

The court appeared to treat the case as one of first impression in the nation where police obtained a warrant for video surveillance in a private residence prior to using wiretaps or listening devices being used prior to secret video recording.[154] Although the court noted that other issues in the case were "eclipsed by the magnitude of the video surveillance question,"[155] it quickly rejected the defendants' claims. The court held that the defendants did not demonstrate "a legitimate expectation of privacy in the searched premises and none of their Fourth Amendment rights were violated."[156]

Relying on the Supreme Court's decision in *Rakas v. Illi-*

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[150] *See* GILBERT WARE, FROM THE BLACK BAR: VOICES FOR EQUAL JUSTICE 110-130 (1976).

[151] *Ricks*, 520 A.2d at 1138.

[152] *Id.*

[153] In their appeal, the appellants argued that the "warrant purporting to authorize the surreptitious video surveillance in a private place was invalid under Maryland law since the general assembly clearly intended to place controls on all manner of secret, electronically aided surveillance by law enforcement in areas not in plain view." *Id.* (court omitted citation).

[154] *See id.* On earlier occasions in its history, the Supreme Court has upheld other intrusive surveillance technologies. *See* Goldman v. United States, 316 U.S. 129, 135 (1942) (using detectaphone, which captures sound waves placed against the wall of an office was not an unconstitutional intrusion because there was no trespass).

[155] *Ricks*, 520 A.2d at 1138.

[156] *Id.* at 1140.

nois,[157] the court reasoned in its decision that the defendants "admitted that they had no proprietary interest"[158] in the apartment, but claimed only to be "invited" there.[159] The court concluded that merely being invited into a residence was not enough to challenge the observation and taping of their images inside.[160]

The defendants appealed that decision to the state's highest court, the Maryland Court of Appeals.[161] The court acknowledged that the threshold issue was standing.[162] The court, however, examined the facts in greater detail than did the court of special appeals. The opinion of Chief Judge Murphy pointed out that at least one of the co-defendants, Ricks, had a key to the apartment.[163]

Rather than making a definitive ruling that any of the defendants had standing, the court merely "assume[d], without deciding, that the appellants had Fourth Amendment standing to challenge the search and seizure in this case."[164]

The court, however, rejected the defendants Fourth Amendment claims, holding that the State did not need to use a less intrusive means of investigation prior to using the highly intrusive video recording cameras.[165] Although the Fourth

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[157] 439 U.S. 128 (1978).

[158] *Ricks*, 520 A.2d at 1140.

[159] *Id.*

[160] *Id.* The storing of visual images, in general, raises many concerns in society. "Video Surveillance cameras quietly scan many workplaces. Neighborhood retailers now stock hardware that used to be the stuff of spy novels." Richard Lacayo, *Nowhere to Hide,* TIME, Nov. 11, 1991, at 34.

[161] *Ricks*, 537 A.2d 612.

[162] *Id.* at 612.

[163] *Id.* at 619.

[164] *Id.* at 620.

[165] *Id.* at 621-22. In examining the appellants' Fourth Amendment claim, the court of appeals took more care than the intermediate appellate court in detailing the nature of the drug investigation and the techniques used prior to seeking the video camera. It explained that:

> Pen registers were utilized; long-distance telephone tolls and criminal history records were monitored; various forms of mobile and fixed surveillance were undertaken, as was use of contact and bumper beepers, attempts to obtain codefendant cooperation, to infiltrate the organization, to conduct a grand jury investigation, to the issuance of search warrants,

Amendment claims offered by the defendants did not prevail, that decision was not the most troubling part of this case.[166] Even though state and federal officials were willing to treat the defendants as having a right to challenge the searches of the apartment, the tentative nature of their approach left open a disturbing possibility.

Should the courts of law be permitted to avoid examining the propriety of new technology after long investigations merely by relying on the technical objection of standing?[167] It appears

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and other investigative methods.

Id. at 614, n.4.

The Court further related the alleged justifications for the more intrusive video surveillance technique:

> Notwithstanding the extensive and lengthy investigation . . . which utilized or considered utilizing all manner and means of conventional and innovative techniques, the application recited that the police were unable to determine the organization's method of interstate supply and the location of other places where the illegal drugs were stored before distribution. The application explained that the organization's members were so disciplined in their speech as possibly to result in failure of interception of oral communications by audio devices; and that authority was therefore necessary to install a video tape camera within the apartment to observe the various aspects of the illegal enterprise. The application recited that a single surreptitious entry to install both electronic devices was essential to avoid detection and to minimize the danger to those authorized to enter the apartment to install the video camera and bugging device.
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> According to the affiants, additional evidence was needed to demonstrate sufficient probable cause to arrest the high echelon members of the organization, who were the primary targets of their surveillance . . . . [T]he affiants related that an authorized search of the apartment would not reveal the source or method of the organization's drugs and distribution, nor would it reveal sufficient information to destroy the organization; moreover, an authorized search of the subject apartment at that time would make it impossible to locate other of the organization's stash houses.

Id. at 614-15 (footnote omitted).

[166] *See* Thomas M. Messana, Note, Ricks v. State*: Big Brother has Arrived in Maryland*, 48 MD. L. REV. 435 (1989) (discussing concerns about the *Ricks* opinions).

[167] In United States v. SCRAP, 412 U.S. 669, 676 (1973), an environmental group sued to keep railroad freight charges low which it believed would reduce the amount of litter in national parks because train traffic promoted more recycling. It claimed that its group members "breathe[d] the air" and "used" the

that even the two state court opinions, acknowledging the important constitutional questions raised, did not deter a half-hearted approach to deciding the question. The courts should have fully embraced their responsibility to get the question answered so that other relevant privacy stakeholders could respond to the outcome.[168]

In cases where new technology is confronted in the courts, the substantive issues need to be immediately addressed so that the court process can be completed and the legislature can respond if it chooses. Failure of the courts to make clear that they will reach the merits of cases involving new technology leaves the legal path to address privacy issues exceedingly unclear.[169]

Such uncertainty creates an atmosphere where more intrusive technology can be developed without adequate privacy safeguards. *Ricks* presents a constitutional close call. Although the court of appeals reached the privacy claim, its hesitation could be interpreted as a signal by other courts that avoiding

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parks. *Id.* at 678, 682. The Court concluded this group did have standing because it would mean that some "widespread government actions would be questioned by nobody." *Id.* at 688.

[168] As technology increases the ease of intrusion, courts should be more willing rather than less willing to reach the merits of search and seizure questions not only in our homes but everywhere. "As society has evolved and our lives have become more mobile, as we spend more and more of our waking hours away from home, there may be even more reason to prize our right to preserve secrecy outside dwellings and to be concerned with novel perils generated by scientific and technological progress." *See* James J. Tomkovicz, *Technology and the Threshold of the Fourth Amendment: A Tale of Two Futures*, 72 MISS. L.J. 317, 425 n.386 (2002).

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> An unresolved issue in the evolution of privacy law is when government data systems should be protected as a private recourse and when they should be treated as a public location in respect to individual privacy interests.
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> Against what interest does the property right fail? . . . Thus, for example, in applying for services, credit, or government benefits, privacy interests typically do not permit the individual to elect not to disclose information pertinent to the person making the decision about eligibility for such items.

NIMMER, *supra* note 18, at 16-7.

the privacy merits by relying on standing is an acceptable alternative.[170] The procedural tool of standing cannot be used to avoid the court's role as a first responder in the constitutional structure to protect us from new, intrusive and sometimes secret search and seizure technology.[171]

STANDING ON LOGICAL SOLUSIONS

Many critics of the Warren court and its liberal Fourth Amendment jurisprudence have also embraced the adoption of stringent standing rules.[172] The all or nothing exclusionary rule sanction has encouraged courts to use any device to avoid imposing its strict requirements.[173] Concern about national security and awareness of increasing terrorist activity in the United States will likely make police investigative conduct seen as more reasonable.[174] The catastrophe of September 11, 2001 has made our nation painfully aware of the risks inherent in free society.[175]

The benefit of a free society demands careful attention to the rule of law. Furthermore, if we are to continue to have an exclusionary rule, consistency and clarity in its application are absolutely critical in our high technology world.[176] The jurisprudence reasonable expectation of privacy as it has currently been formulated by the Supreme Court is inadequate to address the current search and seizure landscape.[177]

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[170] For example, the Supreme Court has held that a court is required to inquire whether the police action was in fact a seizure before determining whether there was a Fourth Amendment violation. *See* Wyoming v. Houghton, 526 U.S. 295 (1999).

[171] The Supreme Court has already demonstrated a willingness to allow technology such as tracking devices to evade constitutional scrutiny. *See* United States v. Knotts, 460 U.S. 276, 285 (1983) (holding that placing a beeper type location device without a warrant in a barrel of contraband is not a search under the Fourth Amendment).

[172] *See, e.g.*, O'BRIEN, *supra* note 84, at 164-69 (discussing the Warren Court's standing requirements).

[173] *See* BORK, *supra* note 12, at 104.

[174] *See* Gibeaut, *supra* note 33, at 35.

[175] *Id.* at 32.

[176] *See* Dempsey, *supra* note 115, at 88-89.

[177] One critic of broad government surveillance asserts that:

A change in substantive Fourth Amendment doctrine is not the so much the issue as is the question of how will emerging new surveillance technology be evaluated as reasonable or unreasonable under traditional Fourth Amendment doctrine.[178]

Fortunately, a few adjustments to the current approach to standing will provide an opportunity for clear judicial guidance by removing barriers to ruling on the Fourth Amendment merits in selected cases in certain high technology areas.[179]

> The history of intelligence in this country is dominated by a systematic invention, usurpation, and abuse of the power to engage in it. In American public life we almost invariably reduce power conflicts to issues of due process, of individual rights; the one is typically abstract, and the other more accessible because it is specific and "human." . . .
>
> But one can hardly sweep under the rug the wealth of evidence that intelligence in this country has emerged and spread into a formidable instrument of control simply as the result of a series of power grabs. For more than three decades J. Edgar Hoover claimed that the FBI had been entrusted by a presidential directive of September 1939 with an open-ended intelligence mission unrelated to law enforcement.

FRANK J. DONNER, THE AGE OF SURVEILLANCE 7 (Alfred A. Knopf, Inc. 1980).

[178] "The Fourth Amendment's touchstone is reasonableness, and a search's reasonableness is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." United States v. Knights, 534 U.S. 112, 113 (2001) (citing Wyoming v. Houghton, 526 U.S. 295, 300 (1999)).

[179] Professor Arthur Miller, in a prophetic statement about a quarter of a century ago, framed the challenge of the courts' role in privacy protection and the challenges that courts and society would face as we anticipated the promise of the high technology age. He wrote:

> The notion that the courts will recognize a general principle requiring data handlers to treat personal information as confidential or will declare that file keepers owe a fiduciary duty to file subjects seems to be wishful thinking. Nor is it realistic to think that a pledge of confidentiality can be secured on a contractual basis. In most situations involving data extraction, the individual is in no position to demand a promise to this effect. Of course, the courts may change their attitude when the potentialities of the computer become apparent. But to wait for the courts to create common-law obligations and impose them on information extractors, processors, transmitters, and users for the benefit of data subjects will require the patience of Job and may prove to be no more fruitful than agitating for the expansion of the common-law privacy action. Time is a luxury personal privacy cannot afford and the glacial

First, the concept of automatic standing,[180] once abandoned needs to be revisited for searches involving the capture of a person's image by any means—electronic, photographic or digital.[181] It should not matter how the image was obtained, because it would defy logic to suggest a person does not have an interest in the interception, recording, or storing of their image by a government entity.[182] Such interest in recorded image has long been taken for granted in tort law.[183] Actions for invasion of privacy and actions for commercial use of one's private image have been recognized even prior to the age of high technology surveillance.

The concept of reasonable expectation of privacy will still by applied by considering the degree to which a person has knowingly exposed themselves to the public.[184] The objective test that has traditionally been applied to such government searches need not be abandoned. For example, most public travel in open spaces easily would be constitutionally permitted because of courts' traditional "open fields" analysis.[185]

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movement of legal doctrine is inappropriate for the problem at hand.

ARTHUR R. MILLER, THE ASSAULT ON PRIVACY: COMPUTERS, DATA BANKS, AND DOSSIERS 220 (1971).

[180] Some states have adopted automatic standing rules in order to make challenging searches and seizures less burdensome. *See, e.g.*, State v. Alston, 440 A.2d 1311, 1320 (N.J. 1981).

[181] New forms of surveillance technology that actually record facial images and compare features to other persons located in computer databases have been increasingly used by law enforcement. *See* Christopher S. Milligan, Note, *Facial Recognition Technology, Video Surveillance, and Privacy*, 9 S. CAL.INTERDISC. L.J. 295, 303-08 (1999) (describing digital and biometrics technology).

[182] Public use of intrusive video technology is growing. *See* M.J. Zuckerman, *Chances Are, Somebody's Watching You*, USA TODAY, Nov. 30, 2000, at 01.A (describing a forty million dollar surveillance center using 110 remote control cameras in the suburbs of Washington).

[183] However, when one goes out in public the interest in that privacy is also diminished in tort claims. *See* William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 391-92 (1960) (stating that the tort of invasion of privacy is not implicated when a photograph of a person is taken in public "since this amounts to nothing more than making a record, not differing essentially from a full description, of a public sight which any one present would be free to see").

[184] *See Legitimate Expectations*, *supra* note 138, at 203.

[185] Hester v. United States, 265 U.S. 57 (1924) (holding unanimously that revenue agents who observed illegal liquor trafficking from an open field violated

It is my view, however, that the discussion of standing that sometimes arises from search and seizure matters involving recording a person's image may obscure or eliminate court's analysis of the reasonableness of the government's surveillance technique that led to one's recorded image. Such an adjustment would not unduly hamper the efforts of law enforcement to "ferret out crime"[186] with improved surveillance technology. It would, however, require accountability when new technology is used, because courts would be encouraged by the automatic standing rule to reach the merits in these alleged intrusion cases.[187]

It is obvious that technology will always be created far faster than society's ability to evaluate or regulate it with legislation or by court rule. This being the case, it is desirable that courts should confront the new enforcement tool on a case-by-case basis and are in a peculiarly good position to be gatekeepers of the reasonableness of these technologies.

If courts are encouraged to rule on each and every matter by applying an automatic standing approach, government law enforcement agencies will be required to describe the use of new, more invasive technology if they intend to introduce its fruit as evidence.[188] The legislature may respond with appropriate legislation after it is made aware by court proceedings that new technology has been utilized. If the legislature does not respond, courts will continue to formulate policy as to reasonableness and use traditional application of precedent and

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no constitutionally protected interest).

[186] Illinois v. Lidster, 540 U.S. 419 (2004).

[187] *See generally* José Felipé Anderson, *Accountability Solutions in the Consent Search and Seizure Wasteland*, 79 NEB. L. REV. 711 (2000) (arguing for more police accountability in searching and seeking confessions).

[188] One scholar has gone so far as to suggest that, "[i]n this area of rapid technological change, the freedom to be unnoticed in public, and its associated benefits, will disappear unless a right to public anonymity is recognized and enforced." Christopher Slobogin, *Public Privacy: Camera Surveillance of Public Places and the Right to Anonymity*, 72 MISS. L.J. 214, 217, 314-15 (2002) (arguing that the Fourth Amendment should be construed to recognize a right to public anonymity as a part of privacy expectations because "government surveillance of our innocent public activities that are not meant for public consumption is neither expected nor to be condoned").

stare decisis as courts examine the propriety of government intrusion.[189]

A practice that encourages, rather than discourage, these emerging technologies to be submitted to judicial evaluation better serves the orderly development of the law. Applying an automatic standing rule regarding such searches is both logical and practical. Some states have already imposed automatic standing rules through the legislative process.[190] It may be that even due process would require that standing be granted to support meaningful review of the means by which the government obtained a person's image. To do otherwise might allow privacy rights to be violated by supporting the rights without meaningful remedies.

SMITH V. MARYLAND: OUTDATED BEFORE ITS TIME

The application of *Smith v. Maryland*[191] to modern technology needs to be carefully reexamined. It was a flawed decision from the day it was announced, but as time and technology have advanced, it has become abundantly clear that the Supreme Court's heavy reliance on third party access to databases as undermining the expectation of privacy has created a major gap in privacy protection.[192] At a minimum, automatic stand-

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[189] Someone must be the monitor of first instance as new, more intrusive, technology is used by law enforcement; but do courts have any real impact on how government agents intrude? "Some suggest that the police will always find their own ways to evade constitutional rules; others maintain that even in the best of circumstances the Supreme Court is just too distant from the day- to-day decisions of the policeman . . . to have any systematic effect on police behavior." *See* HORWITZ, *supra* note 85, at 96.

[190] *See, e.g.*, State v. Culotta, 343 So. 2d 977 (La. 1976) ("Any person adversely affected by a search or seizure . . . shall have standing to raise its legality in the appropriate court." (quoting LA. CONST. art. I, § 5)).

[191] 442 U.S. 735 (1979).

[192] "Although the conflicting interests involved are compelling, the paramount function of national security is to vigilantly protect the ideals embodied by the very same Amendment that the standard violates. Those ideals cannot be whittled away in today's desire to defend the very same values that provide for our security." David Hardin, *The Fuss Over Two Small Words: The Unconstitutionality of the USA PATRIOT Act Amendments to FISA Under the Fourth Amendment*, 71 GEO. WASH. L. REV. 291, 345 (2003).

ing to challenge evidence collected by the government in remote information databases needs to be recognized.

The modern era of easy information storage and retrieval has created a privacy crisis in which it is impossible to know who has the power to transmit or store information that a person might seek to keep private.[193] The government has a responsibility to investigate crime and protect citizens. Obviously, the government must legitimately invade private matters and collect that information from diverse sources,[194] but increased capability to intrude requires increased accountability. If the facts support their investigative needs, they should not fear an impartial magistrate's review.[195]

Emergency situations involving terrorism, hostages, or circumstances of imminent danger would obviously create a need to intrude on a wide range of records,[196] but there is no need to prevent those whose records have been obtained from electronic storage from litigating the government's justification and process for obtaining the data.

I do not suggest that improving investigative capability is

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[193] It has been argued that a "good society must have its hiding places-its protected crannies for the soul. Under the pitiless eye of safety the soul will wither." Charles A. Reich, *Police Questioning of Law Abiding Citizens*, 75 YALE L.J. 1161, 1172 (1966).

[194] Law enforcement obviously needs data in order to investigate and prosecute crime. High technology has proven particularly useful in the prosecution of offenders engaged in child pornography. *See* Jason Krause, *Can Anyone Stop Internet Porn?: Courts Have Shot Down Laws Protecting Kids from Obscenity Online. Is Cyberspace Suited for a Virtual Privacy Wrapper?*, 88 A.B.A. J. 56 (2002).

[195] In *Camara v. Municipal Court*, 387 U.S. 523, 529 (1967), the Supreme Court said:

> The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.
>
> The key is to insert a disinterested magistrate between the government official and the citizen to give the right against unreasonable search and seizure meaning.

Id. at 532-33.

[196] *See* Milligan, *supra* note 181, at 297.

a constitutional evil. I do not wish to be misunderstood to desire fashioning rules that benefit defendants simply because of the conservative leanings of the Rehnquist Court[197] or to recapture the nostalgia of the often defense-friendly Warren Court.[198] Law enforcement should be permitted to do its job based on articulable facts and reasonable need. Emerging technology requires that government be prepared to articulate their need to intrude as their ability to intrude increases.[199]

Privacy issues, particularly as they relate to stored electronic data bases, need to be examined by legislatures for adequate controls.[200] In the meantime, the Supreme Court should place responsibility for advances in more intrusive technology on the government that seeks to use it. The court should not apply the reasonable expectation of privacy approach to electronic databases in the same manner as it is applied to the protection of abandoned trash.[201] Medical,[202] genetic,[203] and financial data[204] should be afforded greater care from

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[197] *See generally* Craig M. Bradley, *Criminal Procedure in the Rehnquist Court: Has the Rehnquisition Begun?*, 62 IND. L.J. 273 (1987) (discussing Justice Rehnquist's views and the effect he will have on the Court).

[198] *See generally* Fred Gilbert Bennett, *Judicial Integrity and Judicial Review: An Argument for Expanding the Scope of the Exclusionary Rule*, 20 UCLA L. REV. 1129 (1973) (discussing the Warren Court's exclusionary rule and arguing for its expansion).

[199] One insightful commentator has noted that "technological advances pose the challenges that always beset the constitutional enterprise—those involved with trying to create fixed rules, or at least a workable rule of law, for a changing world." Susan Bandes, *Power, Privacy, and Thermal Imaging*, 86 MINN. L. REV. 1379, 1383 (2002).

[200] *See* DOHERTY, *supra* note 29, at 51-52.

[201] *See Greenwood*, 486 U.S. at 39-40 (holding that one does not have a reasonable expectation of privacy in abandoned trash placed at the curb).

[202] *See* Lawrence O. Gostin, *Health Information Privacy*, 80 CORNELL L.REV. 451 (1995) (discussing generally the confidentiality of health records).

[203] *See* Richard C. Turkington, *Medical Record Confidentiality Law, Scientific Research and Data Collection in the Information Age*, 25 J.L. MED. & ETHICS 113 (1997).

[204] United States v. Miller, 425 U.S. 435, 443 (1976) (finding no reasonable expectation of privacy in financial information contained at the defendant's bank because a "depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the [g]overnment." (citing United States v. White, 401 U.S. 745, 751-52 (1971))).

government scrutiny and the presumptions for warrants to access information should be respected.

The everyday use of cellular telephone communication[205], e-mail and other information sharing and communication technology in an increasingly paperless world requires that we constantly monitor new forms of intrusion.[206] The recent use of the Federal Bureau of Investigation's Carnivore program for reading e-mail is an interesting example.[207] The technology for reading e-mail is actually physically attached to the information service provider's equipment.[208] This technology was not even on the congressional radar screen until after it had long been in investigative use.[209] Automatic standing rules would have engaged court review of the technology as soon as the government would have attempted to use the evidence obtained against any one in any court.[210] Assuring more prompt litigation of the reasonableness of the use of such technology will promote public confidence that law enforcement will

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[205] Cellular telephones have less constitutional protection than a standard telephone that was contemplated in *Katz*. *See, e.g.*, United States v. Smith, 978 F.2d 171 (5th Cir. 1992).

[206]

> The explosion of data collection on individual, he said gloomily, has reached the point where it is very difficult for us even to begin to establish any kind of control over our privacy. . . . The hazard is multiplied when information on individuals that is collected for one purpose turns up being used for some other purpose. This inevitably happens when you get a pooling of data from agencies, with multi-access terminals.

VANCE PACKARD, THE PEOPLE SHAPERS 151-52 (1977).

[207] "Carnivore is '[e]ssentially a personal computer stuffed with specialized software, [which] represents a new twist in the federal government's fight to sustain its snooping powers in the Internet age.' The *Wall Street Journal* also reported that Carnivore 'can scan millions of e-mails a second. . . . '" Trenton C. Haas, *Carnivore and the Fourth Amendment*, 34 CONN. L. REV. 261 (2001) (alteration in original) (footnote omitted) (quoting Neil King, Jr. & Ted Bridis, *FBI's Wiretaps to Scan E-mail Spark Concern*, WALL ST. J., July 11, 2000, at A3).

[208] "The Federal Bureau of Investigation . . . asserts that Carnivore represents the FBI's latest effort to keep abreast of the rapidly changing demands of law enforcement. . . . It stresses that Carnivore does not collect all of the data traveling over a network." *Id.* at 262 (footnote omitted).

[209] *See supra* note 128, at 31.

[210] *See, e.g.*, *Culotta*, 343 So. 2d at 981-82.

abide by its dual responsibility to investigate crime and respect constitutional rights guaranteed in the Bill of Rights.[211] The spirit of the Founding Fathers requires no less.[212]

CONCLUSION

Concerns over national security as we enter the new century have caused us to reconsider our crime fighting techniques. The rapid increase of technology has created uncertainty about what constitutional protection citizens really possess.[213] Innovative use of automatic standing rules will help unclutter the Fourth Amendment jurisprudence. It will also help ease the confusion created by the Supreme Court's short-sighted precedent in *Smith v. Maryland*. The rapid growth of technology at a pace that state and federal legislatures could not hope to ever

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[211] "The preservation of freedom requires a positive and continuing commitment." ARTHUR M. SCHLESINGER, JR., THE VITAL CENTER: THE POLITICS OF FREEDOM 189 (1949).

[212] Professor Lawrence Tribe reminds us:

> As Sophocles said, nobody has a more sacred obligation to obey the law than those who make and enforce it.
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> . . .
>
> [T]hose who wrote the Constitution's limitations on how suspects may be pursued obviously knew that taking those limits seriously—that is, obeying them rather than flouting them—would necessarily prevent some guilty people from being apprehended and convicted.

LAURENCE H. TRIBE, GOD SAVE THIS HONORABLE COURT 8 (1985).

[213] On commentator has explained that:

> For a number of reasons, discernment of the relationship between technology and the threshold of the Fourth Amendment is an exceedingly difficult undertaking. The novel, sometimes ingenious, devices that give rise to constitutional questions that were unknown to and unanticipated by those who drafted the Constitution. The conduct these mechanisms make possible often bears little or no ostensible resemblance to the physical intrusions that troubled our ancestors. Nonetheless, the dramatic increases in human capacities they afford can threaten the very same privacy interests that are violated by physical intrusions. Moreover, technological tools sometimes pose novel threats to privacy by enabling officials to gain access to potentially confidential information that was wholly unreachable in an earlier age.

James J. Tomkovicz, *Technology and the Threshold of the Fourth Amendment: A Tale of Two Futures*, 72 MISS. L.J. 317, 445 (2002).

keep pace with is a problem that becomes a greater concern with each passing day.[214] A reasonable balance should be struck between law enforcement's effective use of new technology to investigate crime and the right against unreasonable searches and seizures. Of course, law enforcement should have available the best tools of technology to stop crime.[215]

Accountability, however, for the use of those tools needs to be maintained.[216] Safety and security are a greater concern than ever before. We should always be mindful of the need to be secure from both terrorism and more traditional types of criminal behavior.

Law enforcement needs the best tools to investigate crime.[217] Their power, however, is not unlimited, nor should it

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[214] *See* Patricia Mell, *Big Brother at the Door: Balancing National Security with Privacy Under the USA PATRIOT Act*, 80 DENV. U. L. REV. 375 (2002).

[215] The use of drug testing technology, for example, has reached into the nation's high schools. *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995) (validating drug testing in high schools even without suspicion).

[216] The serious consequences of error in a world dominated by high technology law enforcement cannot be overstated. In the very common example of police record checks during vehicle stops, the person stopped has no choice but to rely on the accuracy of the information contained in the police database. One court considered the importance of deterring even innocent neglect of inaccurate information that leads to arrests. People v. Joseph, 470 N.E.2d 1303, 1305-06 (Ill. App. Ct. 1984). In refusing to extend a good faith exception to faulty information in a computer search relied on by police, the Illinois Supreme Court explained:

> The situation in the instant case reflects a matter within the responsibility and control of police authorities who failed to update their records to accurately reflect defendant's current status. In this age of computerization, we do not believe it would be appropriate to sanction the arrest here, thereby allowing law enforcement authorities to rely on an error of their own making. Moreover, it is our opinion that the good-faith reliance of the arresting officer in acting upon information provided to him through police channels, cannot overcome the intrusion made upon defendant's [F]ourth [A]mendment rights.

Id. at 1306 (citation omitted); *see also* Ott v. State, 600 A.2d 111, 118-19 (1992) (finding that the State failed to establish that a delay of seven days over a weekend and holiday in removing outstanding arrest warrant from police computer records was reasonable).

[217] The Supreme Court has, in some circumstances, approved certain law enforcement techniques involving technological advances to aid police in crime control. *See, e.g.*, California v. Ciraolo, 476 U.S. 207, 215 (1986) (approving high-tech police observation of a residence from an airplane under the plain view doctrine).

be unchecked.[218] The courts have a responsibility to understand its role as the first stop on the road to clarification of the law which guards our privacy and our precious way of life. Clarification of our approach to standing is one of the important ways we can maintain a proper security and privacy balance in a high technology age.

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[218] Professor Yale Kamisar correctly observes:

> [T]he Fourth Amendment may plausibly be viewed as *the* centerpiece of a free, democratic society. All other freedoms presuppose that lawless police action have been restrained. What good is freedom of speech or freedom of religion or any other freedom if law enforcement officers have unfettered power to violate a person's privacy and liberty when he sits in his home or drives his car or walks the streets?

Yale Kamisar, *The Fourth Amendment and Its Exclusionary Rule*, THE CHAMPION, Sept.-Oct. 1991, at 20-21.

COMMENT

NEW APPROACHES TO PHARMACEUTICAL PATENT LAW: WHY CURRENT PATENT JURISPRUDENCE IS INAPPROPRIATE AS APPLIED TO THE UNIQUE CHARACTERISTICS OF CHEMICAL COMPOUNDS

I. INTRODUCTION

As American drug prices soar, generic drug manufacturers have an increased incentive to develop and distribute cheaper versions of pioneer drugs.[1] A struggle has emerged, however, as major pharmaceutical companies defend the high cost of prescription medications as necessary because of the tremendous expenses associated with the research and development of novel, pioneer drugs.[2] The conflict between the two factions

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[1] Through the 1990s, pioneer drug prices increased 8.8% a year, while the consumer price index only showed an increase of 2.6%. David Noonan, *Why Drugs Cost So Much*, Newsweek, Sept. 25, 2000, at 22, *available at* http://www.globalaging.org/health/us/why.htm. The most prescribed drug in the United States, Premarin, increased 12.1% during a one-year period. *Id.*

[2] A recent study determined that, for sixty-eight investigational drugs, the average amount of money spent during discovery and clinical trials totaled over $400 million. Henry Grabowski, *Pharmaceuticals: Politics, Policy, and Availability: Patents and New Product Development in the Pharmaceutical and Biotechnology*

has been described as "the most litigious corner of American industry today."[3] The patent system serves to protect the investment that a pharmaceutical company spends producing these novel drugs by restricting competition from generic drug manufacturers and granting the company a limited monopoly.[4] Patent claim construction, therefore, plays a crucial role in determining the extent of protection that is afforded to the drugs developed by pharmaceutical companies.

In a recent district court case, *Ortho-McNeil Pharmaceutical, Inc. v. Mylan Laboratories, Inc.*,[5] a generic drug manufacturer attempted to prove a pioneer drug's patent invalidity[6] on five general grounds: prior invention,[7] indefiniteness,[8] inequitable conduct,[9] obviousness,[10] and inherent anticipa-

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Industries, 8 GEO. PUBLIC POL'Y REV. 7, 9 (Spring 2003).

[3] Steven Andersen, *Generic Pharmaceuticals: IP's Fiercest Litigation Arena*, 13 CORP. LEGAL TIMES 28 (Nov. 2003).

[4] The American patent system is designed to create varying incentives for inventors: the incentive to invent, the incentive to commercialize and the incentive to design around. DONALD S. CHISUM, ET AL., PRINCIPLES OF PATENT LAW: CASES AND MATERIALS 66-71 (3d ed. 2004). Pharmaceutical companies, safe in the knowledge that their drugs will receive market protection, are able to invest large sums of money to develop new and innovative drugs. Grabowski, *supra* note 2, at 9.

[5] 348 F. Supp. 2d 713 (N.D.W.Va. 2004).

[6] *Mylan Labs., Inc.*, 348 F. Supp. 2d at 720, 761. The district court, pursuant to Rule 52(c) of the Federal Rules of Civil Procedure, entered judgment on partial findings against Mylan on their prior invention and indefiniteness claims. *Id.* at 720.

[7] The Patent Act precludes a party from claiming a patent if:

> before such person's invention thereof, the invention was made in this country by another inventor who had not abandoned, suppressed, or concealed it. In determining priority of invention under this subsection, there shall be considered not only the respective dates of conception and reduction to practice of the invention, but also the reasonable diligence of one who was first to conceive and last to reduce to practice, from a time prior to conception by the other.

35 U.S.C. § 102(g)(2) (2000).

[8] As noted by the court in *Mylan Labs, Inc.*, a claim is indefinite "if, in light of the specification, it does not reasonably apprise those skilled in the art of the scope of the invention." *Mylan Labs, Inc.*, 348 F. Supp. 2d at 738 (quoting Amgen Inc. v. Hoechst Marion Roussel, 314 F.3d 1313, 1342 (Fed. Cir. 2003)).

[9] "Inequitable conduct includes affirmative misrepresentation of a material fact, failure to disclose material information, or submission of false material infor-

tion.[11] This article uses the defenses advanced by Mylan in the *Mylan Laboratories* decision as a template with which to examine the current state of pharmaceutical patent law and the particular problems that are associated with chemical compounds. In particular, three specific issues of patent law that were central to *Mylan Laboratories* (inequitable conduct, the obviousness of enantiomers, and inherent anticipation in the light of scientific disagreement) will be analyzed, and two novel approaches will be suggested that will more effectively protect the tremendous public welfare concerns that are implicated in the tension between generic and pioneer drugs. Part II of this article focuses on the facts of *Mylan Laboratories*. Part III of this article discusses the analysis set forth in *Mylan Laboratories*. Part IV examines the findings of the court. Finally, in Part V, current patent law jurisprudence is examined and potential areas of change are discussed.

II. FACTS

The chemical at issue in this case is levofloxacin—the levorotatory enantiomer of the racemic compound ofloxacin.[12]

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mation, coupled with an intent to deceive by a person with a duty of candor. The duty of candor applies only to the attorneys who prosecute patents and the inventors." *Mylan Labs., Inc.*, 348 F. Supp. 2d at 739 (internal citation omitted).

[10] The Patent Act states:

> [a] patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains.

35 U.S.C. § 103(a) (2000).

[11] "An 'anticipating' reference must describe all of the elements and limitations of the claim in a single reference, and enable one of skill in the field of the invention to make and use the claimed invention." Merck & Co. v. Teva Pharms. USA, Inc., 347 F.3d 1367 (Fed. Cir. 2003); *see also* Verdegaal Bros., Inc. v. Union Oil Co., 814 F.2d 628, 631 (Fed. Cir. 1987) (finding anticipation "only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference").

[12] *Mylan Labs., Inc.*, 348 F. Supp. 2d at 720-21. In organic chemistry terms, isomers are those compounds that are different, yet are comprised of the same

Daiichi Pharmaceutical Co. (Daiichi) claimed levofloxacin in U.S. Patent No. 5,053,407 (the '407 patent).[13] Mylan Laboratories, Inc. and Mylan Pharmaceuticals, Inc. (Mylan) infringed on the '407 patent by filing two Abbreviated New Drug Applications (ANDAs).[14] Because the '407 patent had not yet expired, Mylan filed the ANDAs under an exception that allows generic drug manufacturers to manufacture and distribute generic versions of patented drugs if the original patent is invalid.[15] Mylan properly notified Daiichi of the application, and Daiichi responded with a suit for infringement against Mylan.[16]

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types of atoms in the same amounts. FRANCIS A. CAREY, ORGANIC CHEMISTRY 41 (3d ed. 1996). A narrow category of isomers is composed of stereoisomers, compounds where the comprising "atoms are connected to each other in the same order . . . [b]ut the molecules differ in the arrangement of their atoms in space." *Id.* at 267. When two stereoisomers are non-superimposable mirror images of each other, those two stereoisomers are said to be enantiomers. *Id.* One real-life example that may clarify the nomenclature is to imagine a human's left and right hands as being "enantiomers," or non-superimposable mirror images of each other. *Mylan Labs., Inc.*, 348 F. Supp. 2d at 720.

[13] *Id.* at 719. Johnson & Johnson is the parent company of Johnson & Johnson Pharmaceutical Research & Development, LLC, and Ortho-McNeil Pharmaceutical, Inc., and is licensed to distribute levofloxacin, the compound claimed in '407, in the United States. *Id.*

[14] *Id.* ANDAs are more efficient mechanisms by which to gain FDA approval for drugs because these applications are usually not required to establish safety and effectiveness. Abbreviated New Drug Application (ANDA) Process for Generic Drugs, at http://www.fda.gov/cder/regulatory/applications/anda.htm (last visited Feb. 1, 2005). The ANDA process is codified in the Drug Price Competition and Patent Term Restoration Act of 1984 (Hatch-Waxman Act). 21 U.S.C. § 355 (2000). Ostensibly, this bill was passed with the primary purpose of decreasing the cost of generic pharmaceuticals. H.R. REP. NO. 98-857, at 14 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2647, 2649 ("The purpose of Title I of the bill is to make available more low cost generic drugs.") The Hatch-Waxman Act has also created benefits for the pioneer drug companies "by extending their average exclusive marketing period." William J. Martin, *Reducing Delays in Hatch-Waxman Multidistrict Litigation*, 71 U. CHI. L. REV. 1173, 1183 (2004).

[15] *Id.* The statutory language that creates the Paragraph IV certification states as follows: "[a]n abbreviated drug application for a new drug shall contain . . . a certification . . . with respect to each patent which claims the listed drug . . . that such patent is invalid or will not be infringed by the manufacture, use, or sale of the new drug for which the application is submitted." 21 U.S.C. § 355(j)(2)(A)(vii)(IV) (2000).

[16] *Mylan Labs., Inc.*, 348 F. Supp. 2d at 719-20. Paragraph IV certifications

Of the six claims included in the '407 patent, the only claims in dispute in the case were claims two and five.[17] Even though Mylan had previously agreed that claims two and five clearly referred to the (-) enantiomer of ofloxacin, Mylan argued that claims one and four[18] required "a plain-English 'purity' qualification to avoid a breadth of coverage that would include the prior art racemic ofloxacin."[19] In short, Mylan, relying on *In re Williams*,[20] attempted to convince the court that an unequivocal purity limitation must be included to properly limit a claim to a single enantiomer.[21] Mylan further contended that by using the word "compound" in the same claim as the levofloxacin formula, the claim overreaches and extends to any compound that contains even one molecule of levofloxacin.[22]

III. THE COURT'S ANALYSIS

After establishing the facts of the dispute, the court began by establishing the proper procedure to use in construing patent claims: analysis of the claims, the specification,[23] and the file wrapper.[24] While the specification is not given as

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require that the applicant give notice no later than twenty days after the postmark on the reply the Secretary sends to the applicant to confirm the filing of the application and that the applicant give notice to the owner of the patent that is being challenged as invalid. 21 U.S.C. §§ 355(j)(2)(B)(ii)-(iii) (2000).

[17] *Mylan Labs., Inc.*, 348 F. Supp. 2d at 720. All claims involving claims one, three, four and six were dismissed by the court prior to trial. *Id.* at n.3.

[18] *Id.* at 724. Claims two and five incorporated the term S(-)-9-Fluoro-3-methyl-10-(4-methyl-1-piperazinyl)-7-oxo2,3-dihydro-7H-pyrido[1,2,3-de][1,4]benzoxazine-6-carboxylic acid from claims one and four. *Id.* at 726.

[19] Optical purity is calculated by subtracting the percent of one enantiomer from the percent of the other enantiomer. CAREY, *supra* note 12, at 272.

[20] 36 C.C.P.A. 756 (Cust. & Pat. App. 1948).

[21] *Id.* at 724. The language used in *Williams* to limit the claim to a single enantiomer "called for the laevo rotary form substantially free from the dextro rotary form." *Id.*

[22] *Id.* at 726. At trial, the two parties presented conflicting expert testimony on how "compound" would be understood by a person of ordinary skill in the art. *Id.* at 727.

[23] The specification is required to contain, in "full, clear, concise, and exact terms," a "written description of the invention," and "the manner and process of making and using it." 35 U.S.C. § 112 (2000).

[24] *Id.* at 721. These three elements are not equally balanced in a proper claim

much weight as the language of the claim itself, it nonetheless *must* be consulted when analyzing the extent of the claim.[25] The court, applying the doctrine established above, concluded that the language of the claims did not refer to racemic ofloxacin and was limited to the levorotatory enantiomer of that racemate.[26] The court summarily rejected Mylan's "purity limitation" argument, concluding that the *Williams* court did not substantially analyze the claim language and made no indication that there was a magic-words requirement to patent a particular enantiomer.[27] The court further substantiated its analysis by examining *In re May*,[28] in which claims for a specific enantiomer were upheld despite no purity-limitation language whatsoever.[29]

The court then turned to the construction of the word "compound" as used in claims one and four, and consequently incorporated into the dependent claims two and five.[30] The court, after surveying several cases out of the Federal Circuit Court of Appeals, concluded that "compound" could properly refer to a single molecule of a substance.[31] Further analysis

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construction; rather, they are a hierarchy in which the claim is given the most weight in the analysis. *Id.* at 722.

[25] *Mylan Labs., Inc.*, 348 F. Supp. 2d at 722. "Claims must be read in view of the specification, of which they are a part." Markman v. Westview Instruments, Inc., 52 F.3d 967, 979 (Fed. Cir. 1995).

[26] *Mylan Labs., Inc.*, 348 F. Supp. 2d at 723. "[T]o one skilled in the art," claims two and five refer quite clearly to the levorotatory enantiomer of ofloxacin. *Id.*

[27] *Id.* at 724-25. The entire *Williams* opinion contained only a snippet of claim language. *Id.*

[28] 574 F.2d 1082 (C.C.P.A. 1978). The claims in *May* included only the chemical designation (-) which indicates the levorotatory form of an enantiomer. *In re May*, 574 F.2d at 1084-85. A (+) designation, in contrast, indicates that the chemical is dextrorotatory. CAREY, *supra* note 12, at 272.

[29] *Mylan Labs., Inc.*, 348 F. Supp. 2d at 725.

[30] *Id.* at 726. Daiichi argued, counter to Mylan's assertion, that "compound" must be interpreted to refer to more than a single molecule of ofloxacin because the claim, when properly limited by the specification and prosecution history, refers to pharmaceutical effectiveness. *Id.*

[31] *Id.* at 728. The court agreed with Mylan that the "single molecule definition of 'compound'" most accurately reflects the meaning decided upon in *SmithKline Beecham Corp. v. Apotex*, 365 F.3d 1306 (Fed. Cir. 2004), *vacated on reh'g en banc*, 403 F.3d 1328 (Fed. Cir. 2005), and *Dow Chemical Co. v. Am. Cyanamid*

by the court, however, focused on the inclusion of the (-) designation in the claim and the reiteration of this optical activity in the specifications.[32] Because the expert testimony for both parties acknowledged that more than one molecule must be present in order for optical activity to be measured, "the claims require at least enough levofloxacin molecules to rotate polarized light."[33]

IV. FINDINGS OF THE COURT

At the end of Mylan's case in chief, the court granted Daiichi's Rule 52(c) motion with respect to Mylan's prior invention defense.[34] In order to prevail, Mylan was required to prove that Daiichi's previous Japanese patent application did not cover the levorotatory form of ofloxacin, as described in the '407 patent *and* that Mylan's experts had conceived of levofloxacin and reduced it to practice in September 1985, before the alleged priority date of October 11, 1985.[35] The court held that Mylan did not prove either of the required prongs in order to prevail on the prior invention defense.[36]

Co., 816 F.2d 617 (Fed. Cir. 1987). *Mylan Labs., Inc.*, 348 F. Supp. 2d at 727-28. Furthermore, Daiichi was apparently unable to produce case law that construed "compound" to the contrary. *Id.* at 727.

[32] *Id.* at 728-29. Optical activity refers to the ability of a material to rotate a plane of polarized light. CAREY, *supra* note 12, at 271.

[33] *Mylan Labs., Inc.*, 348 F. Supp. 2d at 729. The most technologically advanced laser polarimeters can, at best, detect enantiomer levels of approximately 0.1%. Sean W. Linder, Gary W. Yanik, & Donald R. Bobbitt II, *Assessment of Enantiomeric Excess at Extreme Levels Using Laser-Based Polarimetry*, at http://www.acs-analytical.duq.edu/ANYL%20Papers%20Orlando%20April%202002.pdf.

[34] *Mylan Labs., Inc.*, 348 F. Supp. 2d at 731. The court initially granted the motions orally, but included written findings to make the record clear on appeal. *Id.*

[35] *Id.* at 732-33. Before filing the '407 patent with the Patent and Trademark Office on June 5, 1986, Daiichi had filed the first of three patent applications in Japan on June 20, 1985. *Id.* at 731-32. The three patent applications, when combined, comprise the '407 patent. *Id.* at 732. Daiichi maintained that the proper priority date was June 20, 1985; Mylan claimed that October 11, 1985, the date of the second Japanese patent application, was the proper priority date. *Id.* at 732-33.

[36] *Id.* at 735, 738. With respect to the priority date challenge, the court ruled that the '712 application did sufficiently describe levofloxacin, and that Daiichi

The court also granted Daiichi's Rule 52(c) motion in regards to Mylan's indefiniteness defense.[37] Indefiniteness does not require ease of claim construction or complete agreement between parties attempting to construe the claims.[38] Mylan failed to produce any testimony establishing that the scope of the claim was not discernable. This defense was therefore rejected by the court[39], which then announced its findings on the post-trial judgments: inequitable conduct, obviousness and inherent anticipation.[40]

Mylan alleged four instances of inequitable conduct on the part of Daiichi;[41] the court rejected all four claims.[42] Specifically, Mylan first claimed that Daiichi's failure to submit oral toxicity studies to the PTO, and its submission of toxicity data that lacked confidence intervals, amounted to inequitable

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could properly claim the invention in question with the filing of the '712 application on June 20, 1985. *Id.* at 734-35. The court went on to analyze the prior invention claim, though it had been established that Mylan had failed the required first prong of the two-prong test. *Id.* at 735-38. Conception must be proven by clear and convincing evidence and "[c]orroboration is required regardless of the inventor's level of interest in the litigation." *Id.* at 735-36. The court took into account "the delay between the event and trial, the interest of the witness, the lack of corroboration, and the relationship between the witness and the alleged prior user" and determined that Mylan did not prove prior invention by clear and convincing evidence. *Id.* at 738.

[37] *Id.* at 731. Claim indefiniteness is a question of law that is based on the court's construction of the claims. Exxon Research & Eng'g Co. v. United States, 265 F.3d 1371, 1376 (Fed. Cir. 2001).

[38] *Mylan Labs., Inc.,* 348 F. Supp. 2d at 738. The relatively high standard of indefiniteness is a reflection of the "statutory presumption of patent validity." *Id.* at 739 (quoting *Exxon Research & Eng'g*, 265 F.3d at 1375).

[39] *Id.* The fact that the experts who testified could not agree on the exact optical purity calculations did not render the claims indefinite as a matter of law. *Id.*

[40] *Id.* at 739, 748, 761.

[41] *Id.* at 740. Of the four allegations of inequitable conduct, three related "to the unanticipated properties of levofloxacin: toxicity, solubility, and potency." *Id.* The fourth allegation maintained that Daiichi failed its duty to disclose prior art by not disclosing a 1985 Gerster reference. *Id.*

[42] *Id.* at 748. An analysis into inequitable conduct is a two-prong examination that requires "affirmative misrepresentation of a material fact, failure to disclose material information, or submission of false material information" along with the intent to deceive. *Id.* at 739. Mylan failed to establish these requirements by clear and convincing evidence. *Id.* at 748.

conduct.[43] Second, Mylan contended that Daiichi omitted solubility data and made representations that were misleading regarding the solubility of levofloxacin.[44] While the court acknowledged that Daiichi's patent was not drafted with complete clarity, it determined that Mylan failed to meet its burden of proof in establishing inequitable conduct with regards to solubility data.[45] Mylan's third attempt to prove inequitable conduct by asserting that Daiichi failed to disclose prior art references was without merit because the publications relating to that prior art succeeded the priority date, the information was constructively disclosed, and the information in the prior art reference was largely cumulative of later disclosed prior art references.[46] Mylan's fourth and final inequitable conduct assertion revolved around allegedly misleading language that Daiichi used to describe the differences in potency between levofloxacin and ofloxacin and between desmethyl ofloxacin and ofloxacin.[47] The court underplayed the discrepancy between the two descriptions, however, and held that the terminology use was not misleading.[48] The court therefore concluded that Mylan failed to establish any

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[43] *Mylan Labs., Inc.*, 348 F. Supp. 2d at 741. The court was unpersuaded that Daiichi had an obligation to file all toxicity data it had on hand to the PTO. *Id.* at 742.

[44] *Id.* at 743. While Mylan did identify one inaccuracy in Daiichi's data, Mylan was unable to demonstrate that the mistake was relevant to water solubility determination. *Id.* at 744.

[45] *Id.* at 745. Though a research scientist involved with solubility testing had poor command of English, the court refused to allow that as a sufficient defense to improper word choice. *Id.* at 744. It also noted, however, that "lack of clarity and poor draftsmanship by attorneys cannot serve as a basis for either finding that a statement was false or inferring intent to deceive." *Id.* at 745.

[46] *Id.* at 746. Good faith intent was established by the unrefuted testimony of one of Daiichi's researchers, who submitted the reference to Daiichi's patent counsel, so that it might be included in the prior art. *Id.*

[47] *Id.* at 747. In particular, Daiichi described the difference between the former as "significant" and the difference between the latter as "somewhat" different; the differences were actually either the same or greater between desmethyl ofloxacin and ofloxacin. *Id.*

[48] *Mylan Labs., Inc.*, 348 F. Supp. 2d at 747. The court relied heavily on the testimony of Dr. Hayakawa, a Daiichi scientist, who testified that "a substantial difference in activity depends on the compounds being compared." *Id.*

inequitable conduct on the part of Daiichi.[49]

Mylan then advanced an obviousness defense against the validity of Daiichi's patent.[50] Mylan asserted that "enantiomers are prima facie obvious vis-à-vis the racemic compound."[51] The court applied the *Graham* factors and determined that Mylan did not meet its burden of proof in establishing obviousness.[52] The court also looked beyond the *Graham* factors and considered Mylan's decision to create a generic version of levofloxacin, the accolades that levofloxacin had received, expressions of skepticism on the part of those persons skilled in the art, and licensing.[53]

Lastly, the court analyzed Mylan's contention that levofloxacin is inherently anticipated by ofloxacin because evidence suggests that ofloxacin metabolizes into levofloxacin *in vivo*.[54] Mylan, however, was unable to produce clear and

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[49] *Id.* at 748. This conclusion was furthered by the inclusion in the prior art of a 1984 article in which the comparative potencies of the chemicals were fully disclosed. *Id.*

[50] *Id.* Obviousness is a question of law, controlled by statute. *Id.* An invention claimed in a patent will be considered obvious, and therefore invalid, "if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art." 35 U.S.C. § 103(a) (2000).

[51] *Mylan Labs., Inc.*, 348 F. Supp. 2d at 749 n.19. The court declined to take this bright-line approach and instead applied the *Graham* factors, as directed by the Federal Circuit Court of Appeals. *Id.*

[52] *Id.* at 760. The *Graham* factors were enunciated as follows:

> Under [section] 103, the scope and content of the prior art are to be determined; differences between the prior art and the claims at issue are to be ascertained; and the level of ordinary skill in the pertinent art resolved. Against this background, the obviousness or nonobviousness of the subject matter is determined. Such secondary considerations as commercial success, long felt but unsolved needs, failure of others, etc., might be utilized to give light to the circumstances surrounding the origin of the subject matter . . . .

Graham v. John Deere Co., 383 U.S. 1, 17-18 (1966).

[53] *Mylan Labs., Inc.*, 348 F. Supp. 2d at 759-60. After looking at all of the factors, the court declared that levofloxacin's unexpected results would be sufficient to "rebut a prima facie case of obviousness." *Id.* at 760.

[54] *Id.* at 762. The Federal Circuit Court of Appeals has long established that if a metabolite is protected under a patent, ingesting a compound that degrades

convincing expert testimony that established that levorotatory enantiomers formed when racemic ofloxacin was ingested.[55] Because Mylan was unable to demonstrate the invalidity of the '407 patent, the court enjoined it from "making, using, offering to sell, selling, or importing the levofloxacin tablets described in" its ANDAs.[56]

V. ALIGNMENT OF *MYLAN LABORATORIES* WITH CURRENT JURISPRUDENCE AND PATENT POLICY

The district court raised three particular topical issues in its analysis of *Mylan Laboratories*: the requirements of proof for inequitable conduct as a defense, the obviousness defense as it relates to enantiomers, and conflicting scientific testimony as it relates to claim construction. These three areas will be examined in turn.

A. *Proof of Inequitable Conduct*

The proof of inequitable conduct currently requires clear and convincing evidence of two elements: the materiality of a misrepresentation or representation, "and whether the representation was made with intent to deceive or mislead."[57] The court will assess the knowledge, materiality, and surrounding circumstances of the patent process because intent to deceive is difficult to prove.[58] In *Mylan Laboratories*, the district

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or transforms into the metabolite in the body may infringe the patented claim. Zenith Labs., Inc. v. Bristol-Myers Squibb Co., 19 F.3d 1418, 1421-22 (Fed. Cir. 1994).

[55] *Mylan Labs., Inc.*, 348 F. Supp. 2d at 762. Two opposing experts offered "two reasonable, conflicting interpretations of the science." *Id.* at 763. The court therefore concluded that until science could resolve the conflict, a legal resolution was precluded. *Id.*

[56] *Id.* at 764; *see also* Ortho-McNeil Pharm., Inc. v. Mylan Labs., Inc., No. 1:02-CV-32, 2005 WL 41648, at *1 (N.D.W.Va. Jan. 4, 2005) (entering formal judgment and injunction against Mylan's manufacture of levofloxacin)).

[57] Scripps Clinic & Research Found. v. Genentech, Inc., 927 F.2d 1565, 1573 (Fed. Cir. 1991). In *Genentech, Inc.*, the court rebuked the district court for failure to look to the intent of the patentee, declaring intent to be "essential as a matter of law to a ruling of inequitable conduct." *Genentech, Inc.*, 927 F.2d at 1574.

[58] Kingsdown Med. Consultants Ltd. v. Hollister Inc., 863 F.2d 867, 876 (Fed.

court judge downplayed the significance of the language chosen by the patent drafters in describing the biological activity of the chemical at issue.[59] The court's interpretation was an accurate reflection of the Federal Circuit's reluctance to find inequitable conduct in patent drafting, as evidenced in the *Genentech* decision.[60] In *Genentech*, the Federal Circuit reaffirmed intent as a vital component of inequitable conduct analysis.[61]

While the interpretation of this rule of law was technically correct, the Federal Circuit, at some point time in time, will be required to re-examine and loosen the intent requirement of the inequitable conduct standard. By creating a two-step analytical framework for inequitable conduct, the Federal Circuit has generated a rule of law wherein a patent drafter can include material and misleading facts without rising to the level of inequitable conduct.[62] Such a situation is in direct conflict with the best mode and enablement statutory requirements of patent drafting.[63] By creating a standard in which the drafter is not required to include exact and accurate terminology to describe the invention, the long-standing statutory requirement of best mode and enablement disclosure will be

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Cir. 1988). The court will also include proof of good faith in its analysis. *Kingsdown Med. Consultants Ltd.*, 863 F.2d at 867.

[59] *Mylan Labs., Inc.*, 348 F. Supp. 2d at 747. Specifically, the district court ruled that the language, if it was misleading, did not amount to an "earthquake[]." *Id.*

[60] *See Genentech, Inc.*, 927 F.2d at 1573-74 (holding that although evidence did not necessarily support statements referring to the purity of the product, inequitable conduct could not be found without sufficient proof of intent).

[61] *Id.* at 1574. "Conduct that requires forfeiture of all patent rights must be deliberate, and proved by clear and convincing evidence." *Id.*

[62] *See supra* note 40 and accompanying text.

[63] 35 U.S.C. § 112 (2000). Specifically, section 112 requires that:

> The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same, and shall set forth the best mode contemplated by the inventor of carrying out his invention.

Id.

eroded.[64] The district court essentially permitted Daiichi to mischaracterize its data with no significant legal repercussions. Unfortunately, the Federal Circuit's stance allows for this type of interpretation.

The current standard for inequitable conduct is therefore unacceptable. Inequitable conduct should be analyzed on a case-by-case basis using a balancing factor test, rather than the more limiting and much more difficult legal standard enunciated in *Hollister, Inc.* and *Genentech, Inc.* To most effectively enforce the best-mode and enablement provisions of the Patent Act, the appropriate factors should include: (1) the materiality of the misrepresentation, (2) the centrality of the misrepresentation to the claim at issue, (3) the effect of the misrepresentation on the information contained in the public domain, and (4) evidence of intent to deceive or mislead on the part of the patent drafter. This test would properly strike a balance between the interests of the pioneer drug manufacturers in protecting its patent and the need for a less burdensome test on the part of generic drug manufacturers who currently face an incredibly high bar in their attempts to demonstrate inequitable conduct.

Of course, given the tremendous amount of investment that pioneer drug companies have poured into pharmaceutical research and development,[65] their property rights are incredibly valuable and should be protected by very stringent standards. However, this is not the correct way to approach the property rights at issue. An increased burden of accuracy and precision should be placed on the pioneer drug company to correctly describe its invention for several reasons.[66] First,

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[64] *See* CHISUM, *supra* note 4, at 155 (noting that section 112 allows third parties to have full awareness of the invention claimed so that the "storehouse of knowledge" is increased and full opportunity is given to would-be competitors to improve on the design or work around it).

[65] *See supra* note 2 and accompanying text.

[66] *See* Shashank Upadhye, *Liar Liar Pants on Fire: Towards a Narrow Construction for Inequitable Conduct as Applied to the Prosecution of Medical Device and Drug Patent Applications*, 72 U. MO. K. C. L. REV. 669, 726 (Spring 2004) (suggesting that "[a] stricter construction of the inequitable conduct rules that forces disclosure of a reference or the truth" would be the most effective way to

pioneer drug companies are given an incredible amount of protection for their patents. While such security is necessary to foster the innovative process in the pharmaceutical industry, it also creates a correspondingly high *quid pro quo* burden on the part of the patent drafter. This protection requires a high level of clarity and information exchange on the part of the patent drafter in exchange for tremendous protection of their product. Second, the statutory language itself requires that patents be drafted in "full, clear, concise, and exact terms."[67]

Pharmaceutical patents must not, therefore, be allowed to drift into hyperbolic or imprecise terminology. Patent drafters, in order to most effectively meet the best-mode and enablement requirements, must be held accountable for their choice of language. The Patent Act puts a high burden on patent drafters; without effective and precise disclosure in a patent, the public domain is weakened and one of the classic justifications for the American patent monopoly is eroded. Finally, pharmaceutical patents frequently revolve around miniscule chemical differences between existing chemical compounds and the compounds being claimed. Because pharmaceutical patents are commonly focused on minute differences, an even higher level of precision is required. In a research field where one atom may be the difference between a poison and an effective pharmaceutical, a very high level of specificity and exactness is necessary.

The factors enunciated above would have at least two major benefits. First, pioneer pharmaceutical companies would have tremendous incentive to properly and clearly describe their claims which would increase and improve the storehouse of knowledge contained in the public domain. Second, generic drug manufacturers would have the ability to demonstrate inequitable conduct on the part of the pioneer drug manufac-

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protect patentees from a charge of inequitable conduct). Upadhye asserts that courts must clarify what behavior will not be tolerated on the part of patentees in order to most effectively protect would-be patentees. *Id.* at 670.

[67] 35 U.S.C. § 112 (2000).

turers with evidence and information available to them. The current test incorrectly places a high burden on the party advancing the defense of inequitable conduct even though this party is at a marked evidentiary disadvantage because they may not have access to the evidence necessary to demonstrate inequitable conduct. It should be noted that this proposed test is not a return to the "gross negligence" standard that was in place before the *Hollister, Inc.* decision. The "gross negligence" standard enunciated in *Driscoll v. Cebalo*[68] was insufficiently vague and permitted mere materiality, with nothing more, to constitute inequitable conduct.[69]

B. Obviousness Defense as It Relates to Enantiomers

Mylan's contention that enantiomers must be obvious upon consideration of the racemic mixture is supported by at least two Federal Circuit Court of Appeals cases.[70] The court declined to follow this line of cases, and it instead applied the *Graham* factors.[71] The court's analysis seems flawed because of the inordinate focus on secondary considerations[72] in the analysis and because of the greater policy concerns that are implicated in the patent granting process.[73] In *Mylan Laboratories*, the court states that "trial evidence of other secondary considerations, taken as a whole, also confirms and bolsters the court's conclusion that Mylan has not proven, by clear and

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[68] 731 F.2d 878 (Fed. Cir. 1984).

[69] "Where [the patent drafters or inventors] knew, or should have known, that the withheld reference would be material to the PTO's consideration, their failure to disclose the reference is sufficient proof of the existence of an intent to mislead the PTO." *Driscoll*, 731 F.2d at 885.

[70] *See In re Jones*, 958 F.2d 347, 350 (Fed. Cir. 1992) (discussing the rise of prima facie obviousness defenses in chemical patent cases).

[71] *See supra* note 51 and accompanying text.

[72] *Mylan Labs., Inc.*, 348 F. Supp. 2d at 761.

[73] *See In re Grabiak*, 769 F.2d 729, 731 (Fed. Cir. 1985) (pronouncing that "generalization should be avoided insofar as specific chemical structures are alleged to be *prima facie* obvious one from the other"). The Federal Circuit has also stated that obviousness must be determined on a case-by-case basis, looking to the specific facts involved in the case at hand. *In re Mayne*, 104 F.3d 1339, 1341 (Fed. Cir. 1997).

convincing evidence, that the '407 patent is obvious."[74]

At some point, the Federal Circuit Court of Appeals will almost certainly be required to rule specifically on the application of a prima facie obviousness defense in an enantiomer patent case.[75] The Federal Circuit has created other niches of prima facie obviousness when faced with similar chemical compounds. For instance, in *In re Dillon*,[76] tetra-orthoesters were found to be sufficiently similar to tri-orthoesters, and the tetra-orthoesters were declared prima facie obvious.[77] *In re May*[78] is the most instructive case on this particular issue; in that case, morphine stereoisomers were determined to be prima facie obvious, though that presumption was overcome by evidence of unexpected cresults.[79] Given the lack of novelty inherent in the invention of one structure which has been known in combination by those skilled in the art, the Federal Circuit should amend the prima facie obviousness framework to include enantiomers. By creating this bracket for a prima facie obviousness defense, the burden would shift to the patent owner to rebut such an obviousness claim through the demonstration of remarkable and unexpected results, as set forth in *In re May*.[80] This balance would effectively set equilibrium between protection for truly novel inventions and availability of drugs to the public.

This obviousness classification is imperative for several reasons. The current system allows unfair manipulation of the patent system on the part of the pioneer pharmaceutical com-

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[74] *Mylan Labs., Inc.*, 348 F. Supp. 2d at 760-61.

[75] *See supra* note 33 and accompanying text.

[76] 919 F.2d 688 (Fed. Cir. 1990).

[77] *Id.* at 692.

[78] 574 F.2d 1082 (C.C.P.A. 1978).

[79] *In re May*, 574 F.2d at 1094; *see also In re Hoch*, 428 F.2d 1341, 1344 (C.C.P.A. 1970) ("Such actual differences in properties are required to overcome a prima facie case of obviousness because the prima facie case, at least to a major extent, is based on the expectation that compounds which are very similar in structure will have similar properties.").

[80] *See supra* note 53. In *Mylan*, therefore, the court was convinced that the unexpected results of levofloxacin were sufficient to overcome any presumption of obviousness.

panies. For instance, a pioneer pharmaceutical company may be able to bring effective infringement claims against any competitor who attempts to use, make, or sell one enantiomer of a two-enantiomer patented pair of compounds. Such claims may be effective on one of several approaches: the offending compound may contain traces of the other enantiomer; the use may constitute infringement because of biological changes to the compound in the body; or a use may be infringed if the original patent effectively claimed the use of the patented compound for a specific disease or disorder. However, if enantiomers are not deemed to be prima facie obvious, then pioneer pharmaceutical companies may be able to legally manipulate the patent process in order to allow themselves to later patent the enantiomer, in effect extending the patent monopoly.[81] Such an extension would violate the very nature of the limited monopoly system that is the cornerstone of the American patent system.

Second, from a more common-sense point of view, judicial notice must be given to the fact that once the chemical structure of a compound is known, its chirality[82] is immediately apparent. Chemical compounds therefore present unique problems for an obviousness analysis that are not present in other areas of patent law. The novelty or non-obviousness[83] of a patent claim is statutorily defined to be viewed from the perspective of one ordinarily skilled in the art.[84] Chirality is a basic chemical concept introduced to any organic chemistry

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[81] This technique for extending the life of a patent is referred to as a "chiral switch" and has been used effectively as a means of extending the shelf-life of a pharmaceutical patent. *See generally* JOHN CALDWELL, *Do Single Enantiomers Have Something Special to Offer?*, 16 HUMAN PSYCHOPHARMACOLOGY: CLINICAL AND EXPERIMENTAL S67 (2001).

[82] A chiral molecule is a molecule that possesses a stereogenic, or chiral, center. CAREY, *supra* note 12, at 267-68. A stereogenic center is a carbon atom (within a larger molecule) that has four different groups attached to it. *Id.* at 268. "Noting the presence of a stereogenic center in a given molecule is a simple, rapid way to determine that the molecule is chiral." *Id.*

[83] "[L]ack of novelty is the epitome of obviousness." *In re May*, 574 F.2d at 1089.

[84] *See supra* note 50 and accompanying text.

student; it is disingenuous to imply that one enantiomer is novel when the complete compound is known.

While the enantiomer itself should be deemed obvious, there is still at least one important niche that pharmaceutical companies could fill in terms of enantiomer development and patentability. Primarily, pharmaceutical companies that invest large sums of money to create single-enantiomer compounds could protect much of their investment by securing a method patent which claims the chemical process invented.[85] Frequently, it is the synthesis of enantiomers that is troublesome to chemical researchers. Therefore, efficient enantioselective[86] chemical processes could still be designed and patented, quite possibly to tremendous financial reward.[87] Because enantiomers are not yet designated as prima facie obvious, pharmaceutical companies can essentially double their patent terms. In other words, a patent holder could first patent the racemic mixture and then develop and patent a single enantiomer of the mixture. By classifying enantiomers as prima facie obvious, the opportunity for manipulation or unfair use of the patent process would be reduced, and the focus would properly shift to the protection of innovative processes and syntheses. This balance would therefore most effectively take into account the unique characteristics of chemical compounds and the synthesis of such compounds.

The obviousness designation would be rebuttable through the demonstration of a remarkable and unexpected result of the enantiomer.[88] While enantiomers frequently produce very

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[85] 35 U.S.C. § 101 (2000). Section 101 sets forth those inventions that are patentable: "any new and useful *process*, machine, manufacture, or composition of matter, or any new and useful improvement thereof." *Id.* (emphasis added).

[86] *See* CAREY, *supra* note 12, at A-73 (defining an enantioselective synthesis as a "[r]eaction that converts an achiral or racemic starting material to a chiral product in which one enantiomer is present in excess of the other"). Such reactions are chemically arduous because optically inactive (non-chiral) reactants cannot produce optically active (chiral) products. *Id.* at 1102. Enantioselective synthesis of optically inactive reactants therefore "requires[s] an enantiomerically enriched chiral reagent or catalyst at some point in the process." *Id.*

[87] *See In re Doyle*, 293 F.3d 1355, 1356 (Fed. Cir. 2002) (dealing with a patent for enantioselective chemical reactions).

[88] *See supra* notes 78 and 79 and accompanying text. Numerous cases reflect

similar results and have very similar chemical properties, there are exceptions that would be able to escape the obvious categorization and would therefore be subject to patent.[89]

C. Scientific Understanding and Its Relation to Inherent Anticipation

The third point of interest in *Mylan Laboratories* revolves around the conflict between patent protection and scientific understanding at the time of invalidity hearings. Mylan relied on *Schering Corp. v. Geneva Pharmaceuticals., Inc.*, in its attack on the inherent anticipation[90] of levofloxacine.[91] The downfall of Mylan's argument, however, was the tremulous nature of the science cited.[92] Because reasonable experts disagreed on the evidence presented by Mylan, the court properly held that Mylan had not proved the elements of inherent an-

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the importance of unexpected results to overcome structural similarity and the presumption of obviousness. *See, e.g., In re Chupp*, 816 F.2d 643, 647 (Fed. Cir. 1987) (finding that an herbicide with unexpected herbicidal effects overcame the presumption of obviousness); *In re Papesch*, 315 F.2d 381, 391 (C.C.P.A. 1963) (declaring that courts "determine[] the unobviousness and patentability of new chemical compounds by taking into consideration their biological or pharmacological properties").

[89] For instance, thalidomide is a racemic compound composed of two enantiomers of highly distinct chemical properties. CAREY, *supra* note 12, at 280. (R)-Thalidomide is an anti-nausea drug and sedative that was used in Europe during the early 1960s. *Id.* However, (S)-thalidomide is teratogenic and causes serious birth defects in children whose mothers took it while pregnant. *Id.* Thalidomide was banned in the 1960s but has recently come into the medical spotlight and has been approved as an effective treatment for symptoms associated with leprosy. Thalidomide, at http://www.atdn.org (last visited Feb. 10, 2005). Thalidomide is also being currently researched for its potential role in the treatment of AIDS and other illnesses. *Id.*

[90] *See supra* note 11.

[91] 339 F.3d 1373 (Fed. Cir. 2003). *Schering* dealt with the inherent anticipation of descarboethoxyloratadine (DCL) by a claim for loratadine. *Schering*, 339 F.3d at 1375. The court determined that because DCL was necessarily formed from the ingestion and metabolism of loratadine, DCL was anticipated by the loratadine claim which extended to the ingestion of loratadine by humans. *Id.* at 1380.

[92] *Mylan Lab., Inc.*, 348 F. Supp. 2d at 762. Daiichi's expert, Dr. Myerson, attacked one of the studies relied upon by Mylan as being "crude" and based on "flawed assumptions." *Id.* at 763.

ticipation by clear and convincing evidence, as required. The American patent system requires this evidentiary standard; however, the approach adopted by the American patent system is certainly not the only approach that could have been adopted. For instance, in a patent system that was established with a greater emphasis on patent scope limitation, inherent anticipation could be found wherever the patent holder could not rebut a claim similar to the one made by Mylan.

This potential dichotomy closely follows the ever-present intellectual property debate that revolves around the balance between protection for inventors and the availability of inventions to the public.[93] The American patent system, rather than take the alternate route mentioned above, has been modified by other methods in an attempt to open the drug market to competition.[94] Allowing uncertainties in scientific understanding to benefit the patent holder is unlikely to be modified in the foreseeable future. The American pharmaceutical industry continues to be a world leader in drug research and development; such investment would decrease if patent protection was limited in connection with the fruits of that research and development.

Inherent anticipation is particularly problematic as applied to chemical compounds[95] for two major reasons. First,

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[93] *See generally* Colleen Chien, *Cheap Drugs at What Price to Innovation: Does the Compulsory Licensing of Pharmaceuticals Hurt Innovation?*, 18 BERKELEY TECH. L.J. 853 (Summer 2003) (discussing various countries' reticence to patent drugs because of the potential for monopoly abuse and America's compulsory licensing scheme as a means to bypass such abuses).

[94] *See Id.* at 867 (discussing two distinct methods by which compulsory licenses have been granted over pharmaceutical patents). Compulsory licensing has been used in America, in accordance with 28 U.S.C. § 1498 (2000), to secure antibiotics for military use, and the threat of compulsory licensing was effectively brandished to lower the price of Cipro. *Id.* at 868. Antitrust litigation has also resulted in the imposition of mandatory licensing schemes against drug manufacturers. *In re. Am. Cyanamid Co.*, No. 7211, 1963 F.T.C. LEXIS 77, at *352 (F.T.C. Dec. 17, 1963).

[95] *See, e.g.,* Marion Merrell Dow, Inc. v. Baker Norton Pharms., Inc., 948 F. Supp. 1050, 1053-54 (S.D. Fla. 1996) (analyzing the meaning of the word "compound" and declaring that the meaning formed "the crux of the dispute between the parties).

Federal Circuit "precedent does not require a skilled artisan to recognize the inherent characteristic in the prior art that anticipate the claimed invention."[96] This rule is particularly troublesome as applied to chemical compounds because of the enormous potential for metabolism and change of a drug in the human body. It is possible that a drug would produce dozens, if not hundreds, of metabolites once ingested.[97] Fortunately, the holding in *Schering Corp.* is tempered by the court's determination that the chemical compound at issue "forms in readily detectable amounts . . . upon ingestion."[98] The term "readily detectable," however, produces special problems in the pharmaceutical context. As scientific equipment and methodology continue to improve, the Federal Circuit will have to return to the "readily detectable" standard and clarify the requirement. One proposed solution: the court should follow its jurisprudence in the obviousness arena and hold that metabolites are not inherently anticipated if the metabolite produces a remarkable and unexpected result. Such a test would protect the original patent holders and also produce incentive for potential patent holders to fully research and investigate potential metabolites of interest.

Secondly, current inherent anticipation jurisprudence is insufficient to cover the intricacies of chemical compounds because the law essentially protects insufficiently disclosed inventions. Chemical compounds and drugs are analytically novel because of the tremendous capacity for metabolism and

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[96] *Schering Corp.*, 339 F.3d at 1378; *see* Paul G. Alloway, Note, *Inherently Difficult Analysis for Inherent & Accidental Biotechnology Inventions*, 38 SUFFOLK U. L. REV. 73, 83-84 (2004) (discussing the Federal Circuit's recent clarification of its stance on inherent anticipation with respect to recognition by a person having ordinary skill in the art).

[97] Maria Almira Correia, *Drug Biotransformation*, *in* BASIC & CLINICAL PHARMACOLOGY 50-61 (Bertram G. Katzung ed., 7th ed. 1998) (discussing the enormous variety of metabolism routes in the human body and the potential effects of the formed metabolites).

[98] *Id.* at 1379. The court focused on the levels of DCL produced in the human body in an attempt to distinguish the case of *In re Seaborg*, 328 F.2d 996 (C.C.P.A. 1964), in which incredibly small amounts of an isotope were produced by a previously claimed nuclear reaction process. *Schering Corp.*, 339 F.3d at 1379.

change.[99] Pharmaceuticals are not stagnant inventions; they transform and the resulting transformations have the potential to be patentable in their own right.[100] By recognizing inherent anticipation as applied to pharmaceuticals, the Federal Circuit is implicitly allowing incomplete disclosures (though such incompleteness is through no fault of the patent holder) and later rewarding the initial patent holder. A stricter standard should be developed in the chemical arena; this standard should allow for full protection of those pharmaceutical patents that are sufficiently and fully disclosed in accordance with current technology and knowledge. Inherent anticipation, however, is inappropriate as applied to metabolically active chemical compounds because of the windfall such recognition creates for the patent holder.

VI. CONCLUSION

Mylan Laboratories quite handily demonstrates the current state of American patent law as it relates to pharmaceutical innovations and the highly complicated area of chemical compounds. Patent law is presently at a crossroads as the federal courts strive to accommodate for the complexities of pharmaceutical law and balance the rights of patent-holders against the rights of the American public and potential competitors.

In order to effectively maintain the benefits and rewards system inherent in the American patent system, pharmaceutical law will have to develop to embrace the varying concerns of all parties involved. Most notably, the burden of proof for the defense of inequitable conduct must be lowered to both preserve the public domain and maintain effective competition between generic drug manufacturers and pioneer drug compa-

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[99] *See supra* note 97 and accompanying text.

[100] *See* Correia, *supra* note 97, at 50 (discussing the in vivo production of pharmacologically active molecules from inactive parent drugs). For instance, terfenadine, the antihistamine compound at issue in *Marion Merrell Dow, Inc.*, produced active metabolites. Alan Burkhalter, David J. Julius, & Bertram G. Katzung, *Histamine, Serotonin, & the Ergot Alkaloids*, *in* BASIC & CLINICAL PHARMACOLOGY 266 (Bertram G. Katzung ed., 7th ed. 1998).

nies. Also, the federal courts must expand their current obviousness framework to include enantiomers as one of a few categories of compounds that qualify as prima facie obvious. By making this classification a rebuttable presumption, sufficient protection is given both to those generic drug manufacturers who seek to enter the marketplace and to those pioneer drug companies who create unexpected and remarkable enantiomeric compounds or who create novel syntheses of enantiomers. Finally, the Federal Circuit must clarify its analysis of inherent anticipation in order to most effectively preserve and protect the development and production of metabolites.

In the near future, patent law will likely have to both expand and limit certain common law concepts in an attempt to further strike the proper balance in this highly controversial and highly litigated area of jurisprudence.

A. Meaghin Burke

BOOK REVIEWS

MARC M. HARROLD, OBSERVATIONS OF WHITE NOISE: AN 'ACID TEST' FOR THE FIRST AMENDMENT

iUniverse (2005), $15.95

Michael J. Gorman[*]

One is hard-pressed to find a more relevant—and far-reaching—topic than the First Amendment. And yet, despite its pervasiveness, it is difficult to articulate why the First Amendment has become part and parcel of America's everyday life. To aid those who have struggled with this problem (in depth or in passing), Marc M. Harrold, of the University of Mississippi School of Law, offers *Observations of White Noise: An 'Acid Test' for the First Amendment.*[1] *White Noise*, through anecdotes and insightful commentary, offers some reasons why the Amendment persists to occupy our courts, our actions,

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[1] MARC M. HARROLD, OBSERVATIONS OF WHITE NOISE: AN 'ACID TEST' FOR THE FIRST AMENDMENT (2005).

and our popular culture. In doing so, Harrold's work shows just how far the Amendment can reach.

White Noise begins with a short, but concise, explanation of the structure and supports of the Amendment, providing the necessary back story one needs to decipher contemporary First Amendment jurisprudence. This material, like the entire work, is comprehensible to the lay person without sacrificing legal nuance. In the first section, Harrold argues that the plain text of the Amendment itself should predominant its interpretation. What's more, *White Noise* offers a "residual definition" of the Amendment's protections, outlining what it does not protect and leaving us the remainder. For those without formal study on the First Amendment, this introductory material creates a solid foundation for continued exploration.

Chapter 2 sheds light on contemporary obscenity doctrine, its shortcomings, and a potential cure. Despite the best efforts of profound and sophisticated legal minds, obscenity remains immune to definition, save Justice Potter Stewart's famous declaration: "I know it when I see it."[2] For Harrold, inherent in Justice Stewart's remark is the notion that sexual content should not be the *sine qua non* of obscenity. If the Court is reluctant to recognize the clear command of the First Amendment ("Congress shall make no law..."[3]), and retrogrades to a "balancing test," then that test should allow for non-sexual obscenity. Currently, under the controlling *Miller* test, speech must be sexual in nature to be obscene.[4]

Of all of the chapters, Chapter 3 presents the most "lawyerly" portion of *White Noise*. Here, Harrold discusses the proper role of the First Amendment in civil suits. Initially, the First Amendment limited the federal government, or to be precise, the Congress. With incorporation, the Supreme Court brought the First Amendment to task on the several states. The common theme here is, of course, state action, i.e., for the Amendment to apply, the government, federal or state, must

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[2] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

[3] U.S. CONST. amend. I.

[4] Miller v. California, 413 U.S. 15, 24 (1973) (defining *Miller* test).

inject some action that allegedly impinges on the individual's constitutional rights. As more and more courts apply the First Amendment into private tort actions, this question, as Harrold notes, arises: "Is the Bill of Rights, specifically the First Amendment, a type of social contract between not just the federal government and the people, but also among and between the people themselves?"[5]

Harrold's response is largely shaped in the negative. To his chagrin, courts are seizing on the landmark decision of *Brandenburg v. Ohio*,[6] and creating absolute constitutional bars, where the normal strictures of tort law would suffice to govern private disputes. To illustrate, Harrold uses "shock torts"[7] as an example of the misapplication of *Brandenburg*. It may be judicially tempting to use the First Amendment to resolve contentious, and volatile, cases such as *Rice v. Paladin Press*,[8] where the publisher of the infamous book *Hitman*, a manual for contract killing, was stripped of any First Amendment protection; but, even if the "expansion of the First Amendment ... to a roving protector of speech in all of its forms is . . . possibly desirable[,] . . . these boundaries should be constructed by Democratic [sic] government...."[9]

In Chapter 4, Harrold offers a more cohesive and defined approach to *Brandenburg*'s use in private tort actions, using a continuum where ideas (e.g., abstract teaching of lawlessness) and overt acts (e.g., shouting fire in a crowded theatre) occupy polar opposites. He then determines where a number of shock-

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[5] *Id.* at 41.

[6] 395 U.S. 444 (1969).

[7] Harrold uses the "shock tort" definition of Professor John Charles Kunich, which is:

> [A] cause of action based on acts of violence causally linked to the perpetrator's exposure—especially if a minor—to shockingly violent forms of mass entertainment that, on their face, appear to be calculated primarily to appear to persons with an appetite for killing or sociopathic behavior particularly of an unlawful nature.

HARROLD, *supra* note 1, at 46 (quoting John Charles Kunich, *Natural Born Copycat Killers and the Law of Shock Torts*, 78 WASH. UNIV. L. Q. 1157, 1158 (2000)).

[8] 128 F.3d 233 (4th Cir. 1997).

[9] HARROLD, *supra* note 1, at 59.

ing examples would fall on this continuum. For example, is a website offering "efficient" methods of suicide merely teaching lawlessness or is that step-by-step explanation an overt act?[10] Despite this tall order, *White Noise* offers some interesting answers, which, like the law itself, are unfortunately not susceptible to mathematical certainty. Not surprisingly, questions of religion are equally elusive.

Chapter 5 is *White Noise*'s foray into the Establishment Clause. Harrold devotes his energy in this chapter to responding to the Jeffersonian cliché of a "wall between church and state." A limited historical journey and a terse discussion of applicable Establishment Clause doctrine suffice to show where this piece of popular culture may have gone awry. Moreover, Harrold notes that the Supreme Court itself may be responsible for the proliferation in these odd cases by interpreting the Constitution "in a vague, sometimes intellectually dishonest, manner, erecting a confusing maze of balancing tests and fluid levels of scrutiny...."[11]

In Chapter 6, titled "Judicial 'Elitism' in America," Harrold takes the global themes of judicial elitism and paternalism and demonstrates how the Supreme Court's jurisprudence in this area has given them life, much like Dr. Frankenstein and his ghoulish creation. It boils down to this: many First Amendment tests require judgment about the questioned speech's value (artistically, socially, etc.) and, necessarily, then this begs the question: whose judgment counts? The nation's? The state's? The local community's? Or, a lifetime-appointed federal judge's, sitting as a jury of one? After reading the lines of cases that Harrold chooses as an example, the answer becomes clear.[12] To round out the chapter, Harrold offers his own experiences with a colorful tattoo artist who challenged

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[10] To be sure, deriving the formula here is just as difficult as applying it, much like an English major doing multiple variable calculus.

[11] HARROLD, *supra* note 1, at 75.

[12] I am not being cryptic, but merely saving for the reader the entertainment value of Supreme Court opinions comparing and contrasting the societal value of full-on nudity versus pasties and G-strings, an analysis that is anything but *de minimis*.

the full apparatus of South Carolina over its odd prohibition against tattooing,[13] which, despite its seemingly inconsequential nature, is in fact a more than adequate example of judicial elitism and paternalism.

Chapter 7 is a facsimile of a trial court motion to dismiss; the motion is predicated entirely on the constitutionality of the F-word. As Harrold notes: "Anyone who has even a remote interest in the First Amendment should read the text of the [m]otion."[14] Using history, common sense, and popular culture, the motion's author makes a spirited argument for the constitutional protection of the F-word, among others. Its true value lies in the form and substance, regardless of one's opinion of the subject matter.

In his concluding remarks, Marc M. Harrold offers the following summation of his "observations:"

> I assert that the U.S. Constitution doesn't always do what people want it to. A law that is "constitutional," might, at the same time, be unnecessary, poor policy, or even silly. Is this a good law and is this constitutional are not the same question. . . .
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> The primary premise of my argument is that the current state of our First Amendment has been shaped by the courts and not the People. The courts have "balanced" an individual right that is static and, if interpreted as written, does not allow balancing at all. While the express language of certain Amendments, such as the Fourth Amendment's fluid "reasonableness" requirement or the subjective terms "cruel and unusual" in the Eighth Amendment may allow for such balancing, nothing in the First Amendment invites or allows such manipulation.[15]

To the legal practitioner, the legal scholar, the law student, the

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[13] *See* HARROLD, *supra* note 1, at 94-97. Harrold participated in the case as a co-author on a petition for a writ of certiorari to the United States Supreme Court, which the Court ultimately denied. 537 U.S. 825 (2002). For those interested in the full case, consult either State v. White, 560 S.E.2d 420 (S.C. 2002) or www.freedomtattoo.com.

[14] HARROLD, *supra* note 1, at 102.

[15] *Id.* at 111-12.

professor (at any level), and citizens who ponder our constitutional order, *Observations of White Noise: An 'Acid Test' for the First Amendment* is a worthwhile venture.

THE SHAME OF AMERICAN LEGAL EDUCATION

Joshua S. Kyle[*]

In *The Shame of American Legal Education,*[1] Alan Watson[2] asserts United States legal education's continued use of out-dated and ineffective methods to educate the minds of future attorneys not only produces ill-equipped attorneys, but also fosters a continual drought in American legal scholarship. In a book exemplifying Watson's extensive knowledge of legal history and sincere desire to reform law schools in America, Watson examines the model of legal education that has persisted in America for decades. He then constructs appropriate criticism and recommendations. The ideas asserted in this book will unquestionably cause legal academia to squirm, but

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[1] ALAN WATSON, THE SHAME OF AMERICAN LEGAL EDUCATION (2005).

[2] Watson is also the author of: *Chancellor Kent's Use of Foreign Law*, *in* THE RECEPTION OF CONTINENTAL IDEAS IN THE COMMON LAW WORLD 1820-1920 45 (Mathias Reimann ed., 1993); FAILURES OF THE LEGAL IMAGINATION (1988); *Justinian's Institutes and Some English Counterparts*, *in* STUDIES IN JUSTINIAN'S INSTITUTES IN MEMORY OF J.A.C. THOMAS 182 (P.F. Stein & A.D.E. Lewis eds., 1984); LEGAL ORIGINS AND LEGAL CHANGE (1991); LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (2d ed. 1993); ROMAN LAW AND COMPARATIVE LAW (1991); ROME OF THE TWELVE TABLES: PERSONS AND PROPERTY (1975); SLAVE LAW IN THE AMERICAS (1990); SOCIETY AND LEGAL CHANGE (2d ed. 2001); THE EVOLUTION OF LAW (1985); THE EVOLUTION OF WESTERN PRIVATE LAW (2001); THE LAW OF PROPERTY IN THE LATER ROMAN REPUBLIC (1968); THE MAKING OF THE CIVIL LAW (1981); THE SPIRIT OF ROMAN LAW (1995); THE STATE, LAW AND RELIGION: PAGAN ROME (1992); *Aspects of Reception of Law*, 44 AM. J. COMP. L. 335 (1995); *Legal Change: Sources of Law and Legal Culture*, 131 U. PA. L. REV. 1126 (1983); *The Importance of 'Nutshells'*, 42 AM. J. COMP. L. 1 (1994); *The Evolution of Law: Continued*, 5 LAW & HIST. REV. 553 (1987); and *Trade Secrets and Roman Law: The Myth Exploded*, 11 TUL. EUR. & CIV. L.F. 19 (1996).

Watson justifies his propositions with his knowledge of its effectiveness in foreign law schools.

The book is divided into nine chapters, each discussing a range of aspects of law school life, including: the selection of a law school, the experiences each year of law school offers, the casebook method, "Nutshells,"[3] law professors, and celebrated American legal scholars. Supporting the assertions are personal experiences as well as historical facts unknown to a majority of those in American legal education.[4] In the final part, Watson presents suggestions for renovating traditional American legal education.

After a brief introduction, Watson begins the first chapter of his book using the Rule Against Perpetuities to illustrate law students' fundamental misunderstanding of the law. Watson claims students blindly accept the rule without "much questioning the wisdom of it, the need for it, at its beginnings or today."[5] He contends that even second- and third-year law students are unable to discuss a holding, have no understanding of what drives legal development, and do not consider the weight of precedents from other jurisdictions.[6] Not only is there a failure by law schools to convey information, asserts Watson, but law schools actually misinform students. For example, in a typical first-year Property class, the authors of a casebook claim to define "possession," but actually have merely quoted a few cases. Casebooks should, Watson argues, give the "big picture" to its readers because law cannot be discerned from a few cases. Watson states, "[t]he casebook method of teaching is, in fact, an exercise in futility."[7] Watson also

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[3] "[B]ooks written as teaching manuals (whether in law school or home study) for beginning law students or to instruct non-lawyers in the elements of the law: books, at that, with a wide scope, covering at least the whole of private law." WATSON, *supra* note 1, at 103.

[4] WATSON, *supra* note 1, at 177. Watson, currently the Ernest P. Rogers Professor of Law and Distinguished Research Professor at the University of Georgia, has published many books and articles. *Id.; see supra* note 2.

[5] WATSON, *supra* note 1, at 33.

[6] *Id.* at 27.

[7] *Id.* at 34; Watson gives an example of the flawed casebook approach using the oft-studied case of *Pierson v. Post*, 3 Cai. 175 (N.Y. Sup. Ct. 1805). Watson

suggests in the first chapter that: students entering there second-year will be unaware of the fundamental elements of the law because they have never been asked how the law operates; teaching the law through the casebook method fails to give students a broader framework or structure and presents a misleading picture of the law; only a limited understanding of the law can be garnered through analysis of a few cases.[8]

Watson's second chapter questions why former law students, who are often heavily burdened by student debt, desire to return to be law school professors. Watson argues "that people who wish to be law professors, in general, are not motivated by intellectual enquiry."[9] Instead, the primary drive for becoming a law professor is often the desire to leave the practice of law.[10] Young attorneys are overworked and the life of a professor generally lacks the stress associated with the practice of law.[11]

Choosing a law school is the topic of Watson's third chapter. He suggests that aside from the brightest and most ambitious, students should choose a state university located in the state they expect to work. Often, these schools provide the benefit of low tuition which allows graduates flexibility when choosing a law practice.[12] Watson analyzes the catalogs is-

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claims casebook authors do not explain why authority in the court's opinion are cited. A noted legal historian, M.H. Hoeflich, *Legal History and the History of the Book: Variations on a Theme*, 46 U. KAN. L. REV. 415, 424 (1998), Watson proceeds to work through the particular citations in *Pierce* and examine their importance.

[8] WATSON, *supra* note 1, at 42.

[9] *Id.* at 47; *see also* Donald G. Marshall, *Socratic Method and the Irreducible Core of Legal Education*, 90 MINN. L. REV. 1, 2 (2005) (asserting the correct answer for why one becomes a law professor is the desire to "help students prepare themselves for entry into the legal profession"). Watson hypothecates that the attraction is not the money. During the 2004-05 school year, full professors made between $80,000 and $180,000. *2004-05 SALT Salary Survey*, SALT EQUALIZER (Soc'y of Am. Law Teachers, Wash., D.C.), Feb. 2005, at 1-3.

[10] *But see* MADELEINE SCHACHTER, THE LAW PROFESSOR'S HANDBOOK: A PRACTICAL GUIDE TO TEACHING LAW 9-13 (2004) (asserting many motivations for teaching law, none of which include a desire to leave the practice of law).

[11] *See generally* DAVID H. BARBER, SURVIVING YOUR ROLE AS A LAWYER (1987) (discussing the stress associated with being an attorney).

[12] *But see* Lewis A. Kornhauser & Richard L. Revesz, *Legal Education and*

sued by law schools because he claims they provide the primary source of information about a school.[13]

The next chapter focuses on the much feared first-year experience. Watson asserts that "teaching by terror" is counterproductive to teaching students the law.[14] He explains, "the use of casebooks as the main teaching tool and the Socratic method do not give students what they need in order to understand either the substantive law or how to become a lawyer."[15] However, Watson proposes that professors continue to use this form of teaching because of their ignorance of alternative approaches and tradition.[16] Watson also addresses the required curriculum for first-year law students and exposes that most law schools do not require courses discussing ethics or the social force of law, but instead require courses focusing primarily on analytical skills.[17]

Entry into the Legal Profession: The Role of Race, Gender, and Educational Debt, 70 N.Y.U. L. REV. 829 (1995) (asserting that race, performance in law school and career plans are – in addition to educational debt – also factors in choosing a law practice).

[13] One particular catalog, the University of Indiana at Indianapolis, is criticized for its lack of information concerning curriculum, faculty, fees, student aid, and admissions process. On the other hand, Watson points out the University of Mississippi's catalog as one "that would induce [him] to consider the law school further." WATSON, *supra* note 1, at 56. This catalog is praised for its wealth of information regarding admissions standards, post-graduate employment, programs abroad, and faculty. Watson's analysis exposes the lack of information about scholarship in law school catalogs. Indeed, if law schools wish to attract students equipped with scholarly ambitions, they should highlight both academics and the scholarship success of resident professors.

[14] Watson is not alone in this assertion. *See generally* SCOTT TUROW, ONE L (1977).

[15] WATSON, *supra* note 1, at 63; *see also* SCHACHTER, *supra* note 10, at 154-57 (discussing the benefits and criticisms of the Socratic method).

[16] At least one scholar asserts that the Socratic method is disappearing from law schools. Marshall, *supra* note 9, at 2. Seeking to address the problem of "teaching by terror," Watson lays out a detailed analysis of tradition and its force in legal development and theory. He analyzes and offers the following examples of Western legal tradition: the Rule Against Perpetuities, the commandment requiring one to honor their father and mother, the Roman law of sale, and water and neighbors' rights.

[17] He notes legal writing is the common exception. Additionally, no course is dedicated to providing incoming law students with an introduction to the legal system.

After addressing the first-year experience, Watson turns his focus to casebooks, law reviews, deans and the hiring process. This fifth chapter asserts that casebooks make it difficult to learn legal concepts. Even though they are designed to teach legal analysis, they often only confuse students by offering them pieces of the law. Watson specifically criticizes two widely used casebooks by analyzing and exposing the flaws in each.[18] Watson then claims "[l]aw reviews play no role, or little role, in legal education."[19] While recognizing the prestige of membership on law review, Watson questions the publication's efficiency in producing quality articles. The articles are selected by inexperienced student editors who receive a great deal too many submissions for proper analysis.[20] Another disaster in the law review system, he argues, is the significant role law reviews play in professor tenure and promotion. Watson believes peer-edited journals should, as in other fields of academia, carry more prestige than student-edited reviews. Last, Watson argues deans should be appointed by seniority as a chaired professor, much like the German and Scottish law schools; these deans know the faculty and have an interest in scholarship and intellectualism.

Chapter six highlights "Nutshells," which Watson asserts play virtually no role in American legal education; however, law students find such teaching manuals highly useful. Watson claims that modern legal systems are inconceivable without the input of "Nutshells."[21] Watson's ultimate point: "Nutshells" have played a role in the development of western law

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[18] Watson criticizes the following casebooks: RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS (7th ed. 2000); ARTHUR T. VON MEHREN & JAMES R. GORDLEY, THE CIVIL LAW SYSTEM (2d ed. 1977).

[19] Watson, *supra* note 1, at 88.

[20] Judge Richard Posner asserts that the gravest handicap law reviews suffer from are "that their staffs are composed primarily of young and inexperienced persons working part time: inexperienced not only as students of the law but also as editors, writers, supervisors and managers." Richard A. Posner, *The Future of the Student-Edited Law Review*, 47 STAN. L. REV. 1131, 1132 (1995).

[21] To support this claim, Watson offers a detailed historical account of the development and use of Nutshells throughout the western world. Watson's historical analysis spans from classical Roman law to Blackstone's *Commentaries*.

by synthesizing the law to a communicable form, yet American scholars fail to recognize the significance of "Nutshells" which fill the role casebooks neglect – systematically setting out legal rules.

Chapter seven examines the second- and third-year and focuses on upper level curriculum and working experience law students gain while in school. First, Watson criticizes the lack of guidance regarding which courses to take. He asserts this causes class selection to be based upon the reputation of professors rather than the substance of the law. However, because the majority of upper-level courses continue to use the unsuitable casebook method, students will continue to be bored and unenthused in the majority of courses offered.[22]

The eighth and arguably most controversial chapter suggests three of the most celebrated legal scholars in America write "nonsense."[23] Watson claims his discussion of these scholars is designed not to discredit the authors themselves but to deter professors from blindly following their works.[24] The chapter contains examples of the danger he insists are presented when professors rely on secondary authority without checking the original source themselves.

Watson concludes with his ninth chapter claiming that American legal education is shameful. While our law is exported, our system of legal education is unfortunately not. Finally, the book closes with Watson's suggestions for change to the current system. He would abolish the use of casebooks, student-edited law reviews and the requirement of a college degree. He would reduce the hours of the current compulsory first-year courses and require courses relating the law to society. Finally, Watson would broaden clinical training for the legal profession.

Alan Watson has written a book filled with cutting-edge,

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[22] Moreover, many law students leave law school feeling unprepared for the practice of law. *See generally* Stefanie M. Benson, *Is it Time for Legal Education to Prepare Law Students for Law Practice*, 74 J. KAN. B. ASS'N 12 (2005).

[23] A. Arthur Schiller, Morton Horwitz, and Duncan Kennedy.

[24] Watson closely scrutinizes the reliance by the legal community on the works of A. Arthur Schiller, Morton Horowitz and Duncan Kennedy.

even startling, ideas to reform modern American legal education. *The Shame of American Legal Education* offers readers with not only criticisms of the approach taken by American legal educators, but refreshing and controversial ideas on change. If American law schools seek to continually make the law school experience both rewarding and educational, Watson's ideas should be considered. He proposes ideas with established success in many foreign law schools. Change is something that should not be merely looked into, but should continually be sought after if legal education is to evolve and meet twenty-first century needs.

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